In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-904

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE,

Petitioner,

VS.

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

VARDAMAN S. DUNN
1741 Deposit Guaranty Building
Jackson, Mississippi 39205

WILLIAM F. GOODMAN, JR.
Post Office Box 650
Jackson, Mississippi 39205

Attorneys of Record for Petitioner

Of Counsel:

COX & DUNN, LTD.
1741 Deposit Guaranty Building
Post Office Box 1046
Jackson, Mississippi 39205

WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Deposit Guaranty National Bank of Jackson, Mississippi (real party in interest), prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review its decision entered August 24, 1978, reversing the District Court's order denying a Rule 23(b)(3) class action status in a suit asserting liability for the penalties of usury in favor of a "class" of 90,000 credit card customers of the defendant bank.

OPINIONS BELOW

The opinion of the United States District Court is not officially reported. (Apx. A) The opinion of the Court of Appeals for the Fifth Circuit is reported at 578 F.2d 1106. (Apx. F) Both are appended. Also included is the Judgment of the District Court dismissing the Complaint on payment of the amount demanded. (Apx. B)

JURISDICTION

Jurisdiction is based on 28 U.S.C. §1254(1). The Court of Appeals entered its decision on August 24, 1978 (Apx. F), and denied re-hearing on October 20, 1978. (Apx. G)

QUESTIONS PRESENTED

[Mootness Questions]

I.

For jurisdictional purposes, does a Complaint seeking damages (penalties of usury), when coupled with a class action request, survive the death of the controversy between the named parties before the Court, when the death is occasioned by an effective tender to the named plaintiff of his total damage *after* the District Court, on a full record, has been afforded the opportunity to certify the class but has entered an order declining to certify the suit for class action status?

II.

Does a case in which Rule 23(b)(3) class action status is requested, but denied by the District Court, become moot when the nominal plaintiff is paid in full, after such denial, and no longer maintains a personal interest stake in the outcome of the litigation?

[State Law and Policy Questions]

III.

May the Rule 23(b)(3) procedural device be used to override the substantive law and policy of the forum state on issues which depend for resolution on state statutes?

IV.

To narrow the question further, is the trial court obliged to use the class action procedural device to aggregate usury claims to impose mass penalties against a lender, when the announced substantive law and policy of the state proscribes such an aggregation of claims as unfair to and as a legal fraud upon the lender and when state case law prohibits the use of its usury statutes to such an end—especially where, as here, usury, in terms of liability, vel non, is unknown to federal law, except for violations of state statutes?

[National Bank Questions]

V.

Is the Fifth Circuit correct in holding that national banks are subject to procedural Rule 23(b)(3) in a manner which excludes consideration of state law and policy, when other federal litigants, including state banks, are not so exposed?

[Standard of Review Questions]

VI.

When an experienced District Court Judge considers a full record on the class action issue and demonstrates full awareness of all of the fixed standards by which class action requests under Rule 23(b)(3) are to be resolved, and in the light thereof, exercises a considered discretion, is the decision to deny certification subject to reversal merely because the appeal court panel believes that the case is appropriate for class treatment and would have made a different choice and, therefore, concludes that the trial judge exceeded the "bounds" of his "discretion"?

VII.

Is a District Court *bound* to certify a Rule 23(b)(3) class action when "management" of the case as a class action presents problems which are formidable but not necessarily insuperable? Is the District Court allowed to consider and give effect to the known public policy of the forum state when considering whether the class action is superior for the "fair" adjudication of the controversy?

STATEMENT OF THE CASE

Two individual credit card holders appeared as the named plaintiffs in an action filed in the Mississippi District Court. The plaintiffs alleged violation of the Mississippi statutes on usury and sought to recover for violation of these state statutes to the degree allowed by the National Banking Act. (12 U.S.C., §85-86) The Complaint claimed that it was in behalf of the plaintiffs and 90,000 other credit card holders, and a class certification was requested by Motion. The Complaint, as amended, includes a four-year period prior to the revision of the state's interest statutes in 1974. (Apx. L)

A massive record was developed on the "class action" issue. Acting upon this and in the light of several conferences with the Court, an order was finally entered denying class action status. The 22 page opinion of the District Court is found in the Appendix. (Apx. A)

The District Court found, in sum, (1) that the plaintiffs could not fairly and adequately represent the class because they were neither willing nor able to finance the case as a class action; (2) by pragmatic standards, the case was unmanageable as a class action; (3) that a class action was not superior to other available methods for the fair

and efficient adjudication of the controversy, especially in view of (a) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (b) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender; (c) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Bank Act; (d) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys, and (e) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

Over nine months later, the defendant, weary of the litigation, tendered to the named plaintiffs all that they demanded, plus legal interest and court costs. No one else having sought to intervene and assert claims, the District Court accepted this tender, over the *lawyers'* objection, as an appropriate disposition of the case, and ordered that the Complaint be dismissed. (Apx. B) The money was paid into Court. (Apx. C) The plaintiffs thereby received all that they demanded and all that they could recover in their suit.

No contention has ever been made that the nominal plaintiffs did not receive everything demanded by them in the Complaint which used their names, and no appeal was noticed in their behalf. Their attorneys filed a notice of appeal in plaintiffs' names but only purportedly "on behalf of all others similarly situated". (Apx. D) However, not one potential member of the unnamed and uncertified class had sought to intervene or to join in the attempted appeal.

The bank moved for dismissal of the appeal on the ground that the case was moot. (Apx. E) The Fifth Circuit overruled the motion and proceeded to reverse the orders of the District Court to direct certification of a class. (Apx. F) To summarize the holding:

On the mootness question, the Court held that by the very act of filing a class action, the nominal plaintiffs acquired a legal status which precluded them from taking satisfaction and were not only permitted but were duty-bound to appeal a denial of certification, unless excused by the Court. Despite the plaintiffs' complete loss of all personal financial interest in the case, the court held, nevertheless, that "the individual plaintiffs would maintain a stake in procuring class-wide relief", because, it was said, they maintained a "nexus" with the "class" despite the mootness of their own claims, and that a "case or controversy" persisted. (Slip Op., pp. 6570-6571, Apx. F)

On the question of the application of Mississippi substantive law and public policy, the Court acknowledged that usury claims are penal in Mississippi and are viewed as personal to the borrower and that "the aggregation of such claims is condemned", but then put this aside on the view that a national bank is controlled in matters of procedure by the Federal Rules of Civil Procedure; hence, the Court said, the state law with respect to aggregating usury claims is inapposite and would yield to Rule 23, F.R.C.P.

On the matter of the standard of review, the Court held that "a class action is not only superior to other methods, but singularly appropriate for the adjudication of this controversy", and therefore that the District Court went beyond the bounds of its discretion in denying certification.

SUMMARY OF REASONS FOR GRANTING WRIT

The case involves important questions of general widespread interest, regarding the interpretation and application of the class action Rule 23(b)(3).

Writing for the Second Circuit[1] in 1973, Judge Medina lamented that "Class actions have sprouted and multiplied like the leaves on the green bay tree" In the same opinion, much of the blame was placed on the adoption of "the erroneous and frustrating view that some way *must* be found to make the case viable as a class action". Since 1973, class actions have continued to sprout and multiply. Annotations to the rule in the United States Code cover over 500 pages.

The Fifth Circuit has embraced the "must" philosophy, viewed by other courts as being erroneous and frustrating, and in so doing, has extended the reach of the Rule 23(b)(3) procedural device into new and controversial areas.

The law on this score is in a state of flux and uncertainty. The decision of the Fifth Circuit raises important federal questions which arise from:

(a) The use of a vague "nexus" test to determine mootness in the place of the "personal interest stake" test announced by this Court;

(b) The conference of litigant status upon an uncertified putative class, despite trial court denial of class action status, in order to retain jurisdiction under the requirement for existence of a live case or controversy;

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1. *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA 2, 1973), affirmed, 417 U.S. 156, 94 S.Ct. 2140 (1974).

(c) The fixing of a duty upon a nominal plaintiff to reject satisfaction of his own claim, when tendered after an adverse ruling on the certification claim, and the duty to appeal an order denying class action status unless excused by the court,—thereby forcing a merits trial and appeal in all cases filed as class action attempts, whether certified for class status or not;

(d) The use of a procedural rule to override articulated state substantive law and public policy which proscribes the aggregation of usury claims under its statutes as unfair to and a legal fraud upon the lender;

(e) The discrimination against national banks, where such banks are singled out for exposure to the legal fraud of aggregation while state banks and other lenders with state charters are free of such exposure, contrary to the "most favored lender" status contemplated by the National Bank Act.

The mootness decision of the Fifth Circuit is in conflict with decisions of other Courts of Appeal and, in principle, with its own prior decision. It also adopts and implements a test for mootness which is at variance with and in contradiction of decisions of this Court.

The use of the procedural rule to override substantive law collides with the enabling act under which the rules were adopted and is a misapplication of federal supremacy to encroach unnecessarily upon the public policy of the state from whose statutes liability, vel non, must be derived.

The decision which asserts that the District Court exceeded the bounds of its discretion is a drastic departure from established standards of review governing discretionary trial court determinations and is contrary to the decisions of other Courts of Appeal and a departure from the Fifth Circuit precedents as well.

ARGUMENT

POINT I.

The Case Is Moot

On tender of the full amount demanded by the named plaintiffs, their own claims became moot because they no longer had a personal interest stake in the case. It is the tender itself that moots the case. *A. A. Allen Revivals, Inc.* v. *Campbell*, 353 F.2d 89 (CA 5, 1969); *Lamb* v. *Commissioner*, 390 F.2d 157 (CA 2, 1962); *State of California* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893).

The tender was made *after* the District Court had *denied* a motion to certify the case as a class action under Rule 23(b)(3), and had entered an order *declining* to certify a class.

This tender was accepted by the District Court as an appropriate disposition of the case. The order of dismissal provided that it was "without advantage or prejudice to any of the parties or others". (Apx. B) This terminated the controversy between the named parties before the Court.

The mootness issue turns upon the question of whether jurisdiction survived death of the controversy between the defendant and the named plaintiffs. The Fifth Circuit found that it did survive for three reasons: (1) the nominal plaintiffs could not terminate their "duty" to represent the class by taking satisfaction; (2) the defendant could not force satisfaction by tender of the amount demanded; and (3) the trial court erred in declining to certify a class. The Court also held that the nominal plaintiffs suffered a "duty" to appeal, unless excused by the Court.

The Fifth Circuit's approach is interesting but novel. A Court of Appeals generally takes a case for review as it arrives at the appellate level. Jurisdiction to review for error requires the existence of a live controversy at the time the court is called upon to adjudicate upon any assignment of error. When, therefore, the case is dead on arrival, and the death sentence is executed by means of an order which is alleged to be not *void* but *erroneous* only, then the jurisdiction to adjudicate and declare it so is simply lacking.

The exercise of jurisdiction to revive a case dead on arrival, as here, is without precedential support. It conflicts with the decisions of other circuits, and, most importantly, conflicts with a series of class action "mootness" decisions of this Court.

[Conflict With Other Circuits]

The Seventh Circuit, in *Winokur* v. *Bell Federal Savings and Loan*, 560 F.2d 271 (CA 7, 1970), reh. den. en banc, 562 F.2d 1034, cert. den., 98 S.Ct. 1507 (1978), was presented with essentially the identical situation on a class action complaint seeking damages for violations of the Securities Exchange Act. After entry of an order declining to certify the case as a class action, a tender was made and the case was dismissed by order over the plaintiffs' objection. On appeal, plaintiffs sought review of the order declining certification. The Court held that the case was moot and it lacked review jurisdiction. After reviewing recent cases from the Supreme Court, the Seventh Circuit held:

> "When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action." (560 F.2d at 277)

Because of mootness, several other circuits have rejected appeals from denials of class certification in the face of settlements or satisfaction of the claims of the named plaintiffs. For example, see *Napier* v. *Gertrude*, 542 F.2d 825 (CA 10, 1976) (release of plaintiff from custody); *Vun Cannon* v. *Breed*, 565 F.2d 1096 (CA 9, 1975) (release from custody); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (CA 2, 1976) (demand by indigent for assignment of counsel in divorce case was met).

In *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), the Fifth Circuit affirmed an order dismissing a class action complaint for mootness based upon an order approving a compromise settlement between the defendant and nominal plaintiffs, despite non-involvement of the "class" and the vigorous objections from a potential class member who sought to intervene. The *Pearson* court recognized the effect of a *denial* of certification as effective to strip the case of all class action characteristics[2] and to open the way for disposition of the case by a settlement which excluded the uncertified class, and the Court expressly declined to review the class denial for possible error. This case was cited in the Roper opinion but the obvious conflict was not acknowledged.

[A Distinction in Point]

Some courts have drawn a distinction between cases where the claim of the named plaintiffs is satisfied after denial of certification and those where satisfaction is tendered during pendency of a motion for certification and

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2. See also Advisory Committee's Notes to Rule 23, cited in the opinion.

prior to a ruling thereon. These cases hold that in the first mentioned cases, jurisdiction is lost by mootness but not in the last mentioned cases.

While the view which postpones mootness to allow for a ruling on a prior motion for certification finds no support in decisions of the Supreme Court and is not relevant here on the facts of the instant case, it is mentioned for comparative purposes and to note that there is also a conflict of authority on this approach as well.

Notable for this distinction is the ruling of the Seventh Circuit in the very recent case of *Susman* v. *Lincoln American Corp.*, ... F.2d ..... (CA 7, Oct. 14, 1978), No. 78-1293:

> "We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. . . ."

The *Susman* case distinguishes *Winokur* v. *Bell Federal Savings and Loan,* supra, on the factual basis that *Winokur* involved a tender after denial and *Susman* involved a tender while the motion was pending and before the trial judge could rule on the motion.[3]

The Fifth Circuit recognized the same distinction in *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), but disregarded it in the case at bar, when holding that the case did not become moot in either event, if the Court of Appeals chose to find error in the denial.

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3. The Susman Court acknowledged a conflict, saying:

"We acknowledge the conflict between this decision and that of the Eighth Circuit in Bradley v. Housing Authority of Kansas City, Missouri, 512 F.2d 626 (8th Cir. 1975) . . ."

[Conflict With Supreme Court]

Several cases from this Court bear directly on the mootness question. Most of these cases were relied upon by those circuits whose decisions conflict with the Fifth Circuit. The Fifth Circuit, on the other hand, completely ignores this series of cases.

Since Rule 23 is a rule of procedure only, it cannot serve to enlarge the jurisdiction of federal courts. See *United States* v. *Sherwood,* 312 U.S. 584, 61 S.Ct. 767 (1941). Article III of the Constitution limits jurisdiction to "cases and controversies". A live controversy must appear at each and every stage of the proceedings, including appellate stages. *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975). The same rules apply in class action attempts as in other cases,—with very carefully limited exceptions. (Cases cited, infra) Cases in point include the following:

In *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553 (1975), the plaintiff sought to invalidate a statute of Iowa requiring a residence of one year's duration as a condition to maintaining a suit for divorce. The plaintiff sought to represent a class of persons similarly situated. A three-judge court first certified the class. It then upheld the statute. Pending appeal, the plaintiff satisfied the durational requirement by the mere passage of time and her own case became moot. Based upon the "important consequences" of a formal certification, it was held that the case was not moot for lack of an actual "case or controversy" because:

> ". . . When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . ." (95 S.Ct. at 557)

See also: *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251 (1976); *Gerstein* v. *Pugh*, 420 U.S. 103, 95 S.Ct. 854 (1975), in which the class was precedently certified as in *Sosna*, supra.

In *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 95 S.Ct. 848 (1975), a group of school students who were involved in the publication of a student newspaper filed suit alleging that the school board unconstitutionally issued rules which interfered with the publication. The action was filed as a class suit. It was never certified. On appeal, it was determined that the named plaintiffs had graduated. It was held that the graduation caused the case to become moot as to the named plaintiffs and in the absence of due certification by the trial court, the case was completely moot and beyond consideration on appeal for want of jurisdiction. The Court held:

> ". . . Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (95 S.Ct. 850)

In *Weinstein* v. *Bradford*, 423 U.S. 147, 96 S.Ct. 347 (1975), the plaintiff in custody sought by a class action complaint to force the North Carolina parole board to accord him certain procedural rights in considering his eligibility for parole. The District Court declined to certify the class. It dismissed the complaint. Pending review by the Supreme Court, the plaintiff was paroled and released from supervision.

The Court held that since the named plaintiff ceased to have a personal interest and the requested class had not

been certified, the case was moot. Applying and clarifying the *Sosna* dicta, the Court concluded:

> "Sosna decided that in the absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element. . . ." (96 S.Ct. at 349)

Baxter v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976), was a class action challenge to prison disciplinary proceedings on constitutional grounds. The District Court was said to have treated the suit as a class action but without formal certification. The Court said:

> ". . . Without such certification and identification of the class, the action is not properly a class action. Indianapolis School Comm'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975). . . ." (96 S.Ct. at 1554)

In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 96 S.Ct. 2697 (1976), the Court again emphasized that absent a formal certification of a class, the case is moot when the named plaintiff no longer has a personal stake in the case, and that this is so despite the fact that the parties informally treated it as a class action and its potential members continued to have an interest in the outcome.

Finally in *Kremens* v. *Bartley*, 97 S.Ct. 1709 (1977), the Court cautioned:

> ". . . And it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot. Board of School Com'rs v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (97 S.Ct. at 1717)

It is the *fact* of mootness and not the *cause* of it that counts on the jurisdictional issue. The mootness may arise by act of the parties or otherwise.

In *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 40 S.Ct. 448 (1920), the Court said:

> ". . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ." (40 S.Ct. at 449)

In *State of California* v. *San Pablo & T.R. Co.*, 149 U.S. 308, 13 S.Ct. 876 (1893), the Court held that an action was mooted by tender of all sums which could be recovered, despite the refusal of the plaintiff to accept the tender.

To summarize, this Court is committed to these principles: (1) a continuing live controversy is essential as a jurisdictional base; (2) the live controversy must be one between parties having a legal status before the Court; (3) the mere filing of a complaint seeking class certification does not confer legal party status on the class or on its members; (4) without proper certification by the trial court, the "class" does not attain legal status unless the case falls into the very narrow exception where the asserted wrong to the plaintiff is "capable of repetition, yet evading review".

In this case, there was no certification of a class and the alleged statutory violation is not one shown to be

"capable of repetition, yet evading review", especially since Mississippi amended its interest statutes in 1974 to approve the service rates charged by bank credit cards (Apx. L) and the named plaintiffs do not claim that they continue even to hold a bank credit card.

Although the above cited decisions of this Court have a direct bearing upon the mootness question, all were ignored by the Fifth Circuit without so much as a single citation. Instead, the Fifth Circuit prefaced its discussion with the surprising statement that:

> "The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. . . ."

In this shift of dispositive emphasis from the *fact* of mootness to a *cause* of it (settlement or satisfaction), lies the fundamental error by which confusion is born and by which Rule 23 is mistakenly allowed to enlarge federal jurisdiction.

Settlements, whether by compromise or simple satisfaction, have always been highly favored in the law.[4] Without question, the amount paid fully satisfied the financial demands of the named plaintiffs and they retained no financial stake in the case. The defendant did nothing wrong. It did no more than exercise a traditional legal right to buy peace. Moreover, this occurred only after the District Court had denied certification on a full record,

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4. This principle has been recognized by the Fifth Circuit in previous cases, as to which see *Pearson* v. *Ecological Service Corp.*, 522 F.2d 171 (CA 5, 1975), a class action wherein it was held that a settlement with the named plaintiffs rendered the case moot, despite objections from potential class members who sought to intervene.

and when the case was stripped of all class action characteristics.

The disposition of the Complaint in this case by the dismissal order harms no one. The payment in satisfaction of the named plaintiffs did not affect the rights of anyone else who might wish to come forward and assert claims in the future. There was no trial or judgment on the merits of the case. There was no res judicata.

Since no class was certified, the potential members were never parties. The "class" had no legal status. No one else sought to intervene, either before or after the order of dismissal, as in the cited case of *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464 (1977), although the ten months' lapse of time between the denial of class certification and the final order of dismissal (Apx. A and B) afforded ample time.

The lower court finds that the named plaintiffs continued to have a "nexus" with the putative class which they sought to represent. But what this "nexus" consisted of is not clear, because there was no community of interest in the subject matter and all persons were total strangers, having in common only the fact that they all once utilized the bank's credit cards. More importantly, it is not a "nexus" but a "personal interest stake" that is required under the decisions of this court, and in an action purely to recover money penalties, that personal stake has to be financial, because there is nothing else in sight on which to mount a justiciable controversy.

The bottom line is this: If a defendant in a Rule 23(b)(3) attempt is not allowed to settle or buy peace after the District Court has denied certification, whether correctly or incorrectly, then every case involving class action allegations will have to be tried on its merits in

the District Court and reviewed on appeal before an end can be brought to the action.[5] The traditional right to settle or buy peace and end litigation is a right of substance. There is no such compulsion built into procedural Rule 23(b)(3) as to justify the denial of this substantive right to seek repose. A contrary view can prevail only by embracing the erroneous and frustrating view that every complaint filed as a class action seeking money *must* be handled as a class action. This approach does not comport with the rule's intent to enhance the fair and efficient administration of justice.

POINT II.

The Procedural Rule Has Been Used to Adversely Affect Substantive Rights Under the Law

As did the Fifth Circuit, we begin the discussion of this point with the acknowledgement that: (Slip Op., p. 6576, Apx. F)

> ". . . Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned. Fry v. Layton, 1941, 191 Miss. 17, 2 So.2d 561. . . ."

The relevant substantive law and policy of Mississippi is established by a series of three cases from the state's highest court. As held in *Deposit Guaranty Bank & Trust Company* v. *Williams,* 193 Miss. 432, 9 So.2d 638 (1942):

> "Rights of action or defenses on account of usury are not a part of the common law. They are solely the creations of statute, and such statutes are in the

5. This result would flow from the holding of the Fifth Circuit that by the very act of filing a class action complaint, duties are assumed which cannot be terminated by taking satisfaction, including the "duty" to appeal. (Slip Op., p. 6570, Apx. F)

nature of regulations in the public interest." (9 So.2d at 640)

Note that the Court speaks of both rights of action and defenses. Mississippi takes the view that the aggregation of usury claims in the hands of a stranger to the credit transaction is "unjust" to and a "legal fraud" upon the lender. The reason for the policy is not only to keep a stranger from profiting from the transaction of another, but is to protect the lender from the aggregation of penalties,—contrary to the intent of the laws against usury.

In *Fry* v. *Layton,* 191 Miss. 17, 2 So.2d 561 (1941), the Court dealt with an instance where a plaintiff had purchased usury claims and had taken assignments. The Court held that the assigned claims could not be made the subject of an action by the assignee. The Court said:

> " 'The statute . . . was not meant to give to the borrower any unjust advantage of the lender. Its good purpose should not be perverted into a source of legal fraud by borrowers upon lenders. . . .'
>
> "We hold that appellee, as assignee, cannot recover on these claims. . . ." (2 So.2d at 565)

The later case of *Liddell* v. *Litton Systems, Inc.,* 300 So.2d 455 (Miss., 1974), parallels the instant case exactly and applies the *Fry* "legal fraud" decision in a class action attempt. The Court said:

> "The appellant argues, however, that this suit is brought *on behalf of* and *for the benefit of* the thousands of unnamed borrowers who allegedly paid a usurious rate of interest and is distinguished from Fry, supra. We are not impressed with this argument. If the right to invoke the highly penal forfeiture provisions of the usury laws cannot be assigned even by an instrument in writing as was done in Fry, then it logically follows that such right cannot be invoked by a stranger on behalf of a borrower who has no knowledge of the impending litigation and who may or may not appreciate the acts of his would-be benefactor. . . ." (300 So.2d at 457) (Emphasis by the Court)

The panel's footnote 7-8 comment which refers to *Fry* v. *Layton,* supra, and would limit the "legal fraud" condemnation of the Mississippi court to aggregation by purchase and assignment simply overlooks or ignores *Liddell* v. *Litton Systems, Inc.,* supra, which condemns the aggregation in the class representative context.

Therefore, the major premise is that the substantive law and public policy of the state condemns as unjust to and a legal fraud upon the lenders any aggregation of usury claims in the hands of a stranger to the credit transactions,—whether the stranger is an assignee, or a self or court appointed representative of a class.

Despite its recognition of the state's law and policy against aggregation of usury claims, the Fifth Circuit's opinion proceeds to reject this substantive law and policy on all scores. This rejection is upon the dual premise that we deal (1) with a national bank which is controlled in matters of procedure by the Federal Rules of Civil Procedure and (2) with claims "founded on federal statutes".

However, the first assumption begs the question and the second assumption overlooks the extent to which state law has been integrated into the letter and spirit of the National Bank Act.

The relevant sections of the National Bank Act are found in 12 U.S.C., §85 and §86. Thereunder, when max-

imum interest rates are fixed by the laws of the state in which a national bank is located, the national bank may charge and collect interest at the same rates allowed to other state lenders. With one limited exception not pertinent here, when those state established rates are exceeded in violation of state law, usury is committed.

Under no circumstances whatever may a national bank be found guilty of usury so long as its rates are no greater than those allowed to state banks and other lenders. Indeed, national banks are placed upon a parity with the state's "most favored lender" so as to forestall any chance of adverse discrimination. See *Tiffany* v. *The National Bank of the State of Missouri,* 18 Wall. 409, 21 L.Ed. 862 (1873); *Fisher* v. *First National Bank of Omaha,* 548 F.2d 253 (CA 8, 1977).

In *Daggs* v. *Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732 (1899), the Court said:

> ". . . The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. Tiffany v. National Bank, 18 Wall. 409, 21 L.Ed. 862."

See also: *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 21 L.Ed. 862 (1873); *Citizens National Bank* v. *Donnell,* 195 U.S. 369, 24 S.Ct. 49 (1904).

As put in *First National Bank in Mena* v. *Nowlin,* 509 F.2d 872 (CA 8, 1974):

> ". . . . The primary principle of construction of 12 U.S.C. § 85, . . . is that the federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state. Citizens' National Bank v. Donnell, 195 U.S. 369, 374, 24 S.Ct. 49, 49 L.Ed. 238 (1904); Daggs v. Phoenix National Bank, 177 U.S. 549, 555, 20 S.Ct. 732, 44 L.Ed. 82 (1900). . . ." (509 F.2d at 876)

Once given the existence of a rule of substantive law or a public policy affecting substantive rights and the application of that law and policy to the case at hand, then Rule 23(b)(3), being procedural only, may not be used as an overriding vehicle.

The federal Rules of Civil Procedure cannot be used to affect the substantive rights of the parties because the enabling Act, 28 U.S.C., §2072 provides:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Cf. *Snyder* v. *Harris,* 394 U.S. 332, 89 S.Ct. 1052 (1969); also, see *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005 (CA 2, 1973).

This subject was considered in depth by the District Court, which held that the proscription under state law against the aggregation of usury claims for prosecution by strangers was a rule of substantive law and could not be overridden by procedural Rule 23(b)(3). It was also held that the public policy of the forum state in relation to the limitation upon the enforcement of its own laws was a matter of judicial concern in the determination of whether the Rule 23(b)(3) aggregation was superior for a "fair" adjudication of the controversy. (Apx. A., R. 470, et seq.) Judge Nixon concluded:

> "Since the Mississippi statute law alone determines the matters of both interest and the existence

of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.

"Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the 'fair' adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a 'legal fraud' by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud."

The case law and policy of Mississippi has become a part of its statutes fixing rates and defining usury. When plaintiffs must have recourse to the state's statutes as a basis for determining liability, they must take the statutes with the limitations attached. This principle was announced in *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140 (1886), an admiralty case involving a claim for wrongful death which depended upon a Pennsylvania statute containing a one-year limitation. In giving effect to the limitation, the Court concluded:

". . . No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration

of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

See also *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S.Ct. 1464 (1945), a diversity case.

So it is here. A class type aggregation could not be used in the state court because it is against the law on account of unfairness and legal fraud. It should not be used now because of the accident of federal court jurisdiction.

Traditionally, interest rates are locally determined by state law. Usury follows the determination that those laws have been violated and the state prescribes the condition under which recovery may be had for such violations. Therefore, the underlying substantive rule is based on state law.

The adoption of state law to determine rates and usury and to equalize treatment of national banks in all banking areas is in harmony with the Rules of Decision Act, 28 U.S.C., §1652.[6] Under this mandate, state law is applied, even in non-diversity cases, when "the underlying substantive rule involved is based on state law." *C.I.R.* v. *Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967). The "laws of the . . . state" within the Rules of Decision Act include judicial decisions of the state's highest court. *C.I.R.* v. *Bosch*, supra, and cases cited.

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6. 28 U.S.C., §1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

In order to bring the decision of this case in line with the national policy applied to national banks, it is essential that federal and state courts alike refrain from allowing national banks to be less favored when called to account in the critical area of loans and financing.

There is not, or should not be, one law of fairness for state banks and a different law of fairness for national banks. Mississippi courts of concurrent jurisdiction[7] would not permit it. Why should a federal court impose a discrimination where the state court would reject it?

A legal fraud directed against a state bank is just as much a legal fraud when directed against a national bank. If mass aggregation of usury claims with its potential for imposing a horrendous penalty is unjust to and a legal fraud upon a state bank and others, it is equally unjust and impermissible when applied to a national bank, or so it should be, and this is the way it is in Mississippi.

Finally, the opinion below noted that "All the members (of the class) live in one state. . . ." That state is Mississippi. All of the roots of this case are in Mississippi soil. It is no more than just and fitting, therefore, that Mississippi plaintiffs, along with Mississippi based lenders, be governed by the public policy of their home state when there is no federal pre-emption of that policy as it affects substantive rights.

Lastly, the Fifth Circuit seems to hold that a national bank is controlled in matters of procedure by the Federal Rules of Civil Procedure in some special way. This presents another departure from precedent. There is no precedent for applying the rules differently to national banks merely because they are born under federal charter. With

7. State and federal courts have concurrent jurisdiction. See 28 U.S.C., §1348 and §1349.

a few exceptions, not here relevant, the federal court no longer has exclusive jurisdiction over actions involving national banks. 28 U.S.C., §1348 and §1349. Moreover, the holding begs the question at issue. The question is not whether or to what extent the parties are controlled in matters of federal procedure, but, rather, whether rules of procedure are to be allowed to override the substantive law and disregard public policy.

POINT III.

The Standard Used to Review the Case on Appeal Is Erroneous

At the outset, we must face the broad statement in the Fifth Circuit opinion that the trial court "went beyond the bounds allowed for the exercise of its discretion with respect to Rule 23(b)(3) determination". (Slip Op., p. 6572, Apx. F)

In facing this, we realize that because of the lip service paid to the discretionary rule, it is difficult to demonstrate the underlying defect and to project this in the context of a problem of national scope worthy of this court's attention.

However, we proceed in the firm conviction that the Fifth Circuit has demonstrably adopted a standard of review which serves to shift the discretionary decision-making in Rule 23(b)(3) class action attempts from the District Court, where it belongs, to the Court of Appeals.

In general, other circuits have restricted review in this area to the standard of "abuse of discretion" and have formalized the doctrine in terms of an inquiry on review as to whether the trial judge acted upon an adequate record and with an appreciation of the legal standards to

be regarded in the decision-making process, including considerations of a pragmatic nature.[8] For example:

The Tenth Circuit in *Wilcox* v. *Commercial Bank of Kansas City*, 474 F.2d 336 (CA 10, 1972), found that there was no abuse of discretion, this being "the sole question before us". The Court said:

> "In denying class action status it was sufficient for the trial court to determine on an adequate record and for good reasons stated that the procedure was not superior to other procedures irrespective of whether the common issues of fact or law were predominant." (474 F.2d at 345)

In *Clark* v. *Watchie*, 513 F.2d 994 (CA 9, 1975), the Ninth Circuit spoke to the point of discretion so vested in the trial court as follows:

> "If the trial judge has made findings as to the provisions of the Rule and their application to the case, his determination of class status should be considered within his discretion. . . ." (513 F.2d at 1000)

In *City of New York* v. *International Pipe and Ceramics Corp.*, 410 F.2d 295 (CA 2, 1969), the Court dismissed an attempted appeal from an order denying class action status, holding that the order was not final within §1291, in the course of which the Court observed:

> "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation." (410 F.2d at 298)

8. The Fifth Circuit is no stranger to the "abuse of discretion" standard, as to which see: *Shumate & Co.* v. *National Association of Securities Dealers*, 509 F.2d 147 (CA 5, 1975); *United States* v. *Wright Motor Co.*, 536 F.2d 1090 (CA 5, 1976), especially footnote No. 1.

In *Langnes* v. *Green*, 282 U.S. 531, 51 S.Ct. 243 (1931), this Court said:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich, Claimant, v. Morgan, 186 U.S. 1, 9, 22 S.Ct. 731, 46 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Rule 23(b)(3) especially lends itself to the exercise of a broad discretion because of the need to consider many variables which have no well defined substance or limits and involves factors to be balanced in order to reach a result which is "superior" in method and "fair" as well as "efficient" in its process, giving due regard to the "difficulties" of management and the fair allocation of judicial time and energies.

Compare *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, (CA 2, 1973), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140 (1974), affirming the Second Circuit.

In this case, the trial judge acted upon a full record and with a sharp awareness of all of the elements involved and of the standards by which these were to be balanced and evaluated, as his 22 page opinion clearly demonstrates. (Apx. A)

For example, the trial judge considered the management question and found that the case presented the

formidable management problems described in the opinion. The Fifth Circuit decided that since these problems were not insuperable, the case had to proceed as a class action.

The trial judge considered the law and public policy of the forum state on the question of what was "fair" in the circumstances of the case. The Fifth Circuit removed this consideration from the equation entirely.

Other disagreements, both of fact and opinion, appear as between the findings of the District Court and the conclusions on appeal. This makes it clear that the Fifth Circuit would have made a different "choice", but it also confirms that the "choice" was there to be made in the first place.

There is a need for a uniform and realistic standard of review in Rule 23(b)(3) situations which can effectively command more than lip service on appeal. This is necessary to stop the trend toward a shift of discretion from the trial courts, on whom the management burden rests, to the Court of Appeals.

In urging this Court to speak out on the subject, we realize that there may be varying degrees in the standard in relation to the type of case involved. Some Rule 23 actions are by their nature class actions, such as discrimination and civil rights cases, but a Rule 23(b)(3) aggregation attempt is not by nature a class action, but is just the opposite, and is unknown to the common law. 59 *Am.Jur.* 2d, *Parties*, §51. And in Rule 23(b)(3), there is no command that those whom the law traditionally puts asunder shall be joined together at all cost. The evaluation of the cost in relation to the potential return of benefits should always rest firmly on the discretionary judgment of the trial court whose decision should never be reversed except for arbitrary and unreasoned action.

In sum, the Fifth Circuit has embraced the frustrating but erroneous view that some way *must* be found to handle Rule 23(b)(3) claims as class actions, if the problems of management are not insuperable, and the Court decides for itself on appeal that the case is appropriate for class certification. In so deciding, the discretionary choice vested in the District Court has been effectively shifted to the Court of Appeals.

We urge this Court to enunciate a standard of review which will realistically preserve to the trial courts the right effectively to exercise a sound discretion in relation to Rule 23(b)(3) class action attempts.

CONCLUSION

The Advisory Committee's notes to Rule 23 declare that "a negative determination [of class action status] means that the action should be stripped of its character as a class action".

This negative determination was made by the District Court. Everything which was thereafter done in the case was done upon the assumption that the action was stripped of its character as a class action.

However, under the Fifth Circuit's decision, the mere filing of a complaint, with a request for class certification under Rule 23(b)(3), serves to lock in the case to the point that the litigation cannot be terminated after trial court denial of certification, except by trial and appeal. This awesome result derives from the holding that by the very act of filing, the named plaintiff becomes a class representative who may not take satisfaction and has the continuing duty to appeal from the denial of certification in all cases, unless excused by the Court from so doing.

This "locked in" concept is bound to have a far-reaching effect upon courts and parties alike.

Not only has the Fifth Circuit assumed jurisdiction in a controversy dead on arrival, contrary to several decisions of this Court and other circuits, but, in the process, has given to Rule 23(b)(3) an application not indicated by its terms and far beyond its intent. In so doing, the Court creates non-existent party status and standing; takes over the discretion vested in the District Courts; overrides substantive law; disregards state public policy; sanctions invidious discrimination against national banks, contrary to the intent of the National Bank Act; and discourages settlements between parties before the court and promotes unnecessary litigation in the federal forum.

Respectfully submitted,

VARDAMAN S. DUNN
1741 Deposit Guaranty Building
Jackson, Mississippi 39205

WILLIAM F. GOODMAN, JR.
Post Office Box 650
Jackson, Mississippi 39205

Attorneys of Record for Petitioner

Of Counsel:

COX & DUNN, LTD.
1741 Deposit Guaranty Building
Post Office Box 1046
Jackson, Mississippi 39205

WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 4261(N)

ROBERT L. ROPER, ON BEHALF OF HIMSELF, AND ALL OTHERS SIMILARLY SITUATED

Plaintiff

vs.

CONSURVE, INC., D/B/A BANKAMERICARD CENTER, JACKSON, MISSISSIPPI, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE

Defendants

MEMORANDUM OPINION [459-474]

(Filed September 29, 1975)

The original plaintiff, Robert L. Roper, and the intervening plaintiff, Jack E. Hudgins, former customers and "Bankamericard" card holders of the defendant, Deposit Guaranty National Bank of Jackson, Mississippi, brought this suit against the defendants on behalf of themselves and other Bankamericard card holders of the defendants. It was designated as a class action under Rule 23, Federal Rules of Civil Procedure, and although it named both of the above defendants, the real party in interest is Deposit Guaranty National Bank (Bank).

The Complaint sets forth two causes of action, the first of which alleges violations of the sections of the National Banking Act dealing with interest charges and

penalties for exacting usury, 12 U.S.C. §§85 and 86; the second cause of action is based upon alleged violations of the federal Truth-in-Lending Act, 15 U.S.C. §1601, et seq.

The violations of law for which this action was brought were alleged to have been committed by the Bank in the administration of its credit card program known as "Bankamericard", which was inaugurated in 1968 and which developed between 90,000 and 100,000 individual credit card accounts.

Plaintiffs seek to qualify and act as class representatives for all Bankamericard credit card holders whose accounts were active within the four year period covered by the original and supplemental complaints filed herein, or from September 18, 1969 until September 19, 1973. It is conceded by both sides that there were 90,000 or more card holders during this period of time. Furthermore, it is agreed that the defendant Bank is subject to the provisions of the National Bank Act of June 3, 1964, c. 106, 13 Stat 99 (Tit. 12 U.S.C. §1 ff).

This cause is now before the Court on the motion of the plaintiff for an order certifying this as a class action and for designation of a class representative. This Court initially found that neither the plaintiffs' first nor second cause of action could be maintained as a class action under Rule 23 and ordered that the motion to maintain the second cause of action based upon an alleged violation of the Truth-in-Lending Act as a class action be denied but reserved final decision on the class action question as related to the usury issue until the record was fully developed on the question of the over-all manageability of the case as a class action.

The parties have fully utilized all desired discovery, including taking of depositions, and have filed herein addi-

tional affidavits. These have been considered along with the evidence previously submitted, and in addition, the Court and counsel have engaged in several conferences following which both sides have submitted excellent briefs and have orally argued all facets of this matter.

The Court is now called upon to determine whether the conditions of Rule 23 have been met, including whether a class action under the circumstances of this case is superior to other available methods for the fair and efficient adjudication of this controversy which must be resolved by the exercise of an informed and sound discretion within the guidelines of the rule and cases construing it, taking due care in the process to avoid encroaching upon the substantive law of the forum to the extent that it applies to the case sub judice and has not been pre-empted by federal law.

Before proceeding to decide this class action question, the Court notes that the merit issues herein include whether the so-called service charge is subject to Mississippi statutes on usury; what rate of interest is allowable on loans of credit; whether the effective rate actually paid in any given case is to be determined on a daily, monthly or other basis; and whether the rate so determined was exceeded in any given individual case. The Court may not proceed to decide these issues as long as the class action status of this case remains unanswered, because no merits determination of fact or law can be made without due process notice to all identifiable members of the proposed class, if this is determined to be a proper class action. *Eisen* v. *Carlisle & Jacqueline*, 94 S.Ct. 2140, 417 U.S. 156 (1974); *Miller* v. *Mackey International*, 452 F.2d 424 (5th Cir. 1971).

A modern credit card system such as the Bankamericard system is made possible by the utilization of computer technology. Individual customers apply to a par-

ticipating bank which is part of the Bankamericard system for the extension of credit by the issuance to the applying customer of a credit card. The bank also makes contracts with merchants and vendors of goods and services. A card holder may purchase goods or services from any participating merchant or various member establishments anywhere in the world and charge his purchase on his credit card.

After an individual holder of a card issued by this defendant charges goods or merchandise, his charge ticket is deposited by the selling merchant at the bank with which such merchant has contracted and the latter is given credit to its account for the amount of the charge ticket less an agreed discount. If the bank is one other than the defendant, the ticket is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred by it to the transmitting bank. When the ticket reaches the defendant Bank, it is fed into its computer and is thereby charged to the card holder's account.

Once the purchase is made the customer is granted several choices or options. The customer determines the timing of his purchases or borrowings. If he is billed at the end of each month, a purchase made near the first of the month is not billed for almost thirty days. When he receives the billing, he may wait thirty additional days to pay without incurring any service charge and about 35% of the bank's customers do not incur any service charge at all. In any event, there is no service charge for the period from the date of purchase to a date which is thirty (30) days after the initial billing, which allows a free credit use period of up to approximately sixty (60) days, depending on the timing of the purchase in relation to the billing date. In many instances, delayed deposits of charge drafts by the merchants can extend this free time up to ninety

(90) days. If the customer does not choose in any given month to pay that month's billing in full at the end of thirty days after billing, he may elect to pay in installments, and it is within his discretion to determine the amount of the first payment, subject to a minimum requirement. He may pay the minimum ($10.00 or 5%) or any amount between 5% and 100% and vary this at will from month to month. A service charge is then applied on the remaining balance and it appears on the next billing. Different customers have different paying preferences and the preferences may be changed and varied at the option of the customer provided the payments do not fall below the minimum required.

On the date appointed for billing of a particular card holder's account, the computer is programmed to add charges, subtract credits, add any finance charge due under the defendant's contract with the customer and generate a statement reflecting all such transactions. This statement, together with all of the customer's charge tickets which have accumulated since his last billing are then mailed to him. The data which the computer tapes contain are updated from period to period as the process goes on. Transaction data is not permanently retained on the magnetic tapes. Data is printed and retained in the form of "printouts" which are generated many times throughout a billing cycle and on microfilm which is made of all charge tickets, credit transactions and statements.

From the procedure outlined above, it is apparent that the effective rate of service charges actually paid will vary from one account to another and within each account from month to month or from time to time. Indeed, the witness called by plaintiff as an expert admitted that in view of these options and variables, the effective rate paid would vary from month to month and from

day to day and there would be some periods where the effective rate paid would be above and some where it would be below even 8% simple interest. To determine this crucial question of the effective rate actually paid, a reconstruction of each account, either totally or in some substantial respect, would be necessary before the Court or a jury could determine either liability or amount.

The cost of researching and reconstructing 90,000 accounts, each involving numerous transactions, from microfilm records, is the subject of estimates which vary widely, due in some part to disagreement as to the extent of the reconstruction required and the method to be used, but in any event, the cost in time and money is very substantial, ranging from $367,700.00 to over $3,432,000.00 to cover the four year period.

Even preliminary to this endeavor is the matter of giving notice to at least 90,000 potential class plaintiffs, the cost of which is also substantial.

Another facet of the case has to do with the ability of potential class member plaintiffs to secure relief, if any is due, outside of the class action arena. Pertinent to this question is the fact that Mississippi provides small claims courts conveniently throughout the state which handle a multitude of small claims such as those which might arise from usury. The amount of individual claims over the four year suit period will, of course, vary, but if usury has been committed, as the plaintiff claims, in respect to all finance charges at the rate of 18% per annum, most, if not all individual claims would be substantial. With claims outgrowing from accounts with average balances of $100.00 to $1,000.00, the ad damnum at 18% per annum (doubled) would range from a low of $144.00 to a high of $2,880.00, plus pre-judgment legal interest, and

fall within the jurisdiction of justice courts, county courts and circuit courts, depending upon amounts. Many lawyers throughout the state habitually handle cases in this range. Unlike the highly complex anti-trust cases which have found more than average favor as class actions, there is nothing unduly complex involved in prosecuting actions based on claims for usury. If a case has merit, both client and lawyer make recoveries adequate to justify litigation on an individual case basis. On an equal division arrangement, the client still recovers all interest paid, plus legal interest from the date paid. The lawyer recovers a like amount for his services, because of the 100% penalty which is mandatory in all usury recoveries against national banks.

Against this factual background, the Court will proceed to a discussion of the reasons which have influenced the Court's decision to reject the use of the class action device under Rule 23 in this case.

Under Rule 23, the Court must first determine whether the prerequisites of subpart (a) have been met and additionally whether at least one of the three provisions of subpart (b) is applicable. In reaching a conclusion, the Court adopted a pragmatic approach in an earnest effort to balance the spirit of the Rule with fundamental rights and traditional notions of fair play and equal justice for all alike.

The burden of proof and of persuasion rests throughout upon the plaintiff who seeks to represent a class of numerous individuals. *Poindexter* v. *Teubert*, 462 F.2d 1096 (CA4, 1972); *Rossin* v. *Southern Union Gas Co.*, 472 F.2d 707 (CA10, 1973). The broad terms of Rule 23 have been recognized as calling for the exercise of some considerable discretion of a pragmatic nature. *Ratner* v. *Chemical Bank*

New York Trust Co., 54 F.R.D. 412 (S.D. N.Y. 1972). See also: *Shumate & Co.* v. *National Assn. of Securities Dealers*, 509 F.2d 147 (CA5, 1975).

Speaking for the Court in *Eisen* III (*Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (CA2, 1973)), Judge Medina observed that "[c]lass actions have sprouted and multiplied like the leaves of the green bay tree" and the blame is placed in part upon the "erroneous and frustrating view" that some way "must" be found to entertain the case as a class action. There is no compulsion written into Rule 23.

On the contrary, the compulsion is to search the facts of each case to determine whether justice to all and the efficient administration of justice will best be served by the use of such a device in the circumstances of the particular case at hand.

In this connection, it is not irrelevant to consider who is to benefit and who is to suffer and how and to what extent.

Another consideration is the effect of the class action device on the defendant who finds himself suddenly confronted with thousands of lawsuits, all built into one, and who is faced with claims for damages and penalties reaching astronomical amounts, in this case $14,000,000.00, of which one-half is a statutory penalty,—enough to seriously endanger if not to destroy the very solvency of the bank. The threat implicit in this situation has been referred to as "legalized blackmail." *Eisen* III, 479 F.2d at 1019.

Other courts have placed emphasis upon the undesirable "horrendous penalty" that can be generated by the pursuit of class actions to recover damages and penalties. Cf. *Ratner* v. *Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D. N.Y. 1972); *Rogers* v. *Coburn Finance*

Corp., 54 F.R.D. 417 (N.D. Ga. 1972); *Gerlach* v. *Allstate Ins. Co.*, 338 F.Supp. 642 (S.D. Fla. 1972). When suffering on one side is intense and the benefit on the other is minimal, if any, the Court must proceed with due caution to avoid an injustice, especially when it appears, as here, that each individual who may have an interest is free and able to pursue his own remedy.

In sum, the allowance of class action status in this case will threaten the defendant with a horrendous penalty, and will benefit individual customers little, if at all. On the other hand, to deny the motion will harm no one who sincerely desires to prosecute a claim against the bank, because the statute of limitations has been suspended (*American Pipe and Const. Co.* v. *Utah*, 94 S.Ct. 756, 414 U.S. 538 (1974)), and everyone has a forum available for prosecution of his claim in the traditional manner.

This brings the Court to the question of whether the case is manageable as a class action and the related question of whether common questions predominate.

One directive of Rule 23 is that the Court evaluate "the difficulties likely to be encountered in the management of a class action." Commenting upon the quoted directive the Supreme Court in its review of *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974)) said:

> ". . . Commonly referred to as 'manageability,' this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. . . ." (94 S.Ct. at 2146, 417 U.S. at 164).

The *Eisen* cases, both *Eisen* II and *Eisen* III, include one admonition which deserves threshold emphasis. Judge

Lumbard, in his dissenting opinion in *Eisen* II (*Eisen* v. *Carlisle and Jacquelin*, 391 F.2d 555 (CA2 1968)), observed:

> ". . . Rule 23 does not require or contemplate that courts will hear causes of action as class actions merely because they will not get to hear the case any other way. . . ." (391 F.2d at 572).

The majority in its opinion in *Eisen* III (*Eisen* v. *Carlisle and Jacquelin*, 479 F.2d 1005 (CA2 1973)) sounded the same note with the observation:

> ". . . Much of this time was devoted to an effort by Eisen's counsel to meet the apparently insurmountable difficulties of notice and manageability by adopting the erroneous and frustrating view that some way *must* be found to make the case viable as a class action. . . ." (479 F.2d at 1008).

In its review of *Eisen* III, the Supreme Court of the United States indicated no disagreement whatever with the stated truism. Moreover, this series of decisions, including that of the Supreme Court of the United States, makes it clear that in making the determination of the lack of manageability and superiority and of other necessary prerequisites to the class action approach, the so-called "class" does not ever become a legal entity or a litigant apart from the individual members of the class.

In short, even if the present action wears the cloak of a class action, the individuals composing the class still must be dealt with as individuals and each individual's case must stand or fall upon its own merits.

As a predicate for developing the testimony of the witness offered by plaintiff as a computer expert, the plaintiff's ultimate contention or theory of the case was stated into the record as follows:

> ". . . The contention is that the only relevant factors in computing the refund are the amount of service charges or finance charges billed during the suit period and the amount paid during the suit period." (Copeland dep., p. 46).

Looking solely to these factors asserted as the "only relevant factors," plaintiff would limit the case in its first stage to a computation of the dollars paid by *all* credit card customers in response to service charges for the suit period (initially 24 months but expanded by supplemental complaint to four years). The total of all service charges for all accounts for the four year period, fairly estimated at $7,000,000.00, would then be multiplied by two to create a $14,000,000.00 "fund" which the bank would be expected to pay into Court or disburse as directed, after, of course, deducting attorneys' fees to plaintiff's counsel and other expenses incurred in administration of the case. In phase two, a calculation of dollars paid during the suit period by each customer is contemplated and the amount, after deducting attorneys' fees and expenses, prorated in some fashion not explained, would then be automatically disbursed. All of this, according to the plaintiff is to be done by devising new programs for the bank's computers.

One trouble with the plaintiff's approach thus far is that there is and can be no cause of action for recovery of interest *charged* but only for recovery of interest *paid*. In order to amount to actionable usury, the dollars paid must convert into an *effective* percentage *rate* which exceeds the maximum per annum percentage rate found to be allowed by the law. In this case, the dollar amount charged or paid may or may not convert into an effective percentage rate in excess of the rate found to be allowed by law, depending upon the rate charges in relation to

the time the transactional credit is used by the borrower or customer.

The alternative is to examine and reconstruct each card holder account, which cannot be done without examining each transaction from the microfilm records and either producing copies of each document involved or keypunching the detailed information therefrom into a reprogrammed computer system, the cost and time for which varies from several hundred thousand to several million dollars.

This case is different from one where liability can be shown as to all class members, with only the amount of damages to be determined as to each. *Shumate & Co.* v. *Nat. Assn. of Security Dealers*, 509 F.2d 147 (CA5, 1975).

This Court rejects plaintiff's contrary premise and finds as a fact that each account would have to be reconstructed and individually examined in order to determine liability on the charge of usury as well as the amount in case liability were found to exist. In other words, the Court would be faced with some 90,000 separate cases for trial, possibly by jury, on issues first of liability and then on damages, and there is no way that the defendant may be computerized into mass liability or mass damages in the circumstances of this case. In addition, there are some 11,000 delinquent accounts involved, which would or could become counterclaims and require adjudication. Issues of fact affecting only individual members of the class clearly predominate.

The possibility that the defendant, faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and

disruption of its normal business functions is not a result to be either forced or applauded by this Court. Nor is the Court called upon to run the substantial risk of another *Eisen* "Frankenstein monster posing as a class action." (*Eisen* II, 391 F.2d at 572; *Eisen* III, 94 S.Ct. at 2148, 417 U.S. at 169).

Since the plaintiffs seek to represent a class of individuals who are strangers and who have no voice in the selection of a class champion, the Court is obliged to look closely to the ability of the plaintiffs to adequately represent the class. It is not enough that competent lawyers have committed themselves to the legal representation, although the existence of competent counsel is certainly a prerequisite to adequate representation. In the instant case, the Court is concerned that the stake of the nominal plaintiffs is small and there is no showing that they are either willing or able to finance the litigation as a class action. At the very least, a large sum must be committed at the front end of a class action approach to provide the notice to the class members which due process requires. *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974). The postage alone on 90,000 notices would equal $9,000.00 and the cost of labor and supplies would be quite substantial, and this is only the beginning of economic problems which would plague the case as a class action requiring reconstruction in some form of 90,000 odd accounts over a four year period.

At a conference with the Court, the lawyers for the nominal plaintiffs indicated a willingness to advance the cost of the notice and look to their clients for repayment if the case were lost, but to expect the Court to assume that the nominal plaintiff, with very little involved, would be willing or expected to discharge the client's liability

to reimburse the attorneys is too much. This may be to prefer rich representatives to poor ones, but in this type of case there is no compulsion that there be a representative at all and if there is to be one, he must have the ability, economic and otherwise, to serve in his self-appointed position. Cf. *P.D.Q. Inc. of Miami* v. *Nissan Motor Corporation In U.S.A.*, 61 F.R.D. 372 (S.D. Fla. 1973), and *Sayre* v. *Abraham Lincoln Federal Savings & Loan Assn.*, 65 F.R.D. 379 (E.D. Pa. 1974).

Finally, the Court must determine whether the procedural device, if applied in the circumstances of this case, would do violence to the substantive law made applicable to claims for the penalty of usury by state statutes and decisions, because Rule 23, like the other federal rules of civil procedure, may not abridge, enlarge or modify any substantive right. 28 U.S.C. §2072. As pointed out in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (CA2, 1973):

> ". . . Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.'" (28 U.S.C. §2072).

Generally, the receipt of interest for the loan of credit is not inherently evil. The common law did not condemn the practice or limit the amount. 55 *Am. Jur.* 324; §3. Usury laws derived from the efforts of local lawmakers to strike a balance of fairness to lenders and borrowers alike, having due regard to the economic necessities in the particular locality involved. The right of the states to legislate and formulate public policy in this area cannot be disputed

and the right to legislate and determine policy includes the incidental right to condition or limit enforcement of enacted usury laws expressly and by a judicial policy determination.

If Mississippi has an ascertainable policy for determining what is or is not a "fair" method for adjudicating the extent of the accountability of lenders who are alleged to have received excessive interest under state law, then that policy cannot be ignored either as substantive law or as bearing upon the question of whether a Rule 23 aggregation against the lender is superior for the required "fair" adjudication of the controversy.[1]

The Court concludes that under the substantive law of Mississippi, claims for usury are currently viewed as actions for a penalty and are strictly personal to the borrower and that the action may not be maintained by anyone except the borrower or his legal representative in the traditional sense and that the claim is not subject to assignment to another for collection or otherwise. Specifically, Mississippi law denounces the aggregation of individual usury claims as a *"legal fraud"* upon, and therefore as being *unfair* to the lender.

The aggregation of usury claims is against public policy in Mississippi and is stoutly condemned by its case law.[2]

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1. An overwhelming number of courts have ruled against requested spurious class action treatment of Truth-in-Lending actions. See *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (CA3), *cert. den.* 419 U.S. 885 (1974). One reason is that the policy underlying the law is inconsistent with an aggregation of claims to produce excessive penalties. Analogizing, this Court perceives no good reason why like respect should not be accorded to state policy where state laws are invoked as a basis for recovery.

2. There is a sharp conflict of authority on the question of whether an action for usury is exclusively personal and nonassignable, but Mississippi takes a positive stand on the point. See Anno. 82 A.L.R. 1008 and 134 A.L.R. 1335.

A leading case is *Fry* v. *Layton*, 191 Miss. 17, 2 So.2d 561, 134 A.L.R. 1330 (1941).

In this case the plaintiff, Fry, was a customer of and borrower from the defendant Layton, who was in the small loan business. He filed a suit seeking recovery for usury paid on his own loan and for that paid by eighteen other customers similarly situated who had assigned their claim to him. The Court held that Fry could not recover usury paid as assignee of others similarly situated. This was not grounded on procedure but upon the substantive policy and law of Mississippi as it relates to usury actions. The Court said:

> "As was said by this Court in Byrd et al v. Newcomb Mill & Lbr. Co., 118 Miss. 179, 79 So. 100, 101: 'The statute protects and safeguards the borrower by penalizing sharply the lender in the usurious contract; but it was not meant to give to the borrower any unjust advantage of the lender. Its good purpose should not be perverted into a source of legal fraud by borrowers upon lenders.' "

The Court concluded:

> "We hold that appellee, as assignee, cannot recover on these claims, but since he appears to have been the borrower upon two of them, the case is reversed and remanded." (2 So.2d at 565).

See also: *Liddell* v. *Litton Systems, Inc.*, 300 So.2d 455 (1974), citing and following *Fry* v. *Layton, supra,* wherein the Court said:

> "This Court has held that the forfeiture provisions of the usury laws are highly penal in nature and must be strictly construed. (Citing cases)." (300 So.2d at 456).

There is nothing contra in the National Banking Act. The federal law fixes no interest rate limits apart from local law and condemns no usury apart from state law. The federal statutes reach only to the point of assuring that national banks are not treated less favorably than state banks or other competitive lenders in the interest charge area and of limiting the penalty for violating state usury laws, in any event, to double the amount of interest actually paid. Indeed, like Mississippi, the National Banking Act expressly limits the right to sue for usury to "the person by whom it has been paid or his legal representative," 12 U.S.C. 86, again leaving to state law the question of who is a "legal representative" who may maintain such an action. See *Louisville Trust Co.* v. *Kentucky National Bank*, 87 Fed. 143 (D. Ky. 1898), and cases annotated to 28 U.S.C. §86. State laws differ as to the definition of a "legal representative", but Mississippi happens to limit the term to exclude even voluntary assignees of borrowers, to the ultimate substantive end that the lender may not be faced in any case with an aggregation of claims for the usuary penalty in the hands of a stranger to the individual loan transactions, such being viewed as a "legal fraud". *Fry* v. *Layton, supra,* and *Liddell* v. *Litton Systems, supra.* There is no indication of a Congressional interest to encourage litigation in this area or to override state policy.

Since the Mississippi statute law alone determines the matters of both interest and the existence of liability for usury and since Mississippi prescribes conditions to the invocation of its consequent penalties, we deal with substantive law and Rule 23, being neither substantive nor compulsory, does not stand in the way or justify the Court in violating the established policy of the state. To do so would not only be contrary to the Enabling Act under which the rules were adopted but would be to sanction

invidious discrimination against national banks in this area, contrary to the letter and spirit of the National Banking Act.[3]

Moreover, the Court would be hard pressed to conclude that the aggregation of usury claims against this national bank was superior for the "fair" adjudication of the controversy in the very face of the clear holding of the Mississippi Court that such amounts to a "legal fraud" by borrowers contrary to the intent of the state's statutes on usury. Rule 23 was not designed as a device to perpetrate a legal fraud.

Turning, finally, in partial summary, to the specifics of Rule 23, the Court finds that the numerosity, commonality and typicality requirements of subpart (a) are present but that the plaintiffs cannot fairly and adequately protect the interests of the class, because they are neither able nor willing to finance the case as a class action.

Subparts (b)(1) and (2) are inapplicable. See *Goldman* v. *The First National Bank of Chicago*, 56 F.R.D. 587 (N.D. Ill. 1972); *Kenny* v. *Landis Financial Group, Inc.*, 349 F.Supp. 939 (N.D. Iowa, 1972); *Eisen* III, 479 F.2d

3. Attempted federal court actions against state banks or other lenders would fail in most cases for lack of the minimum jurisdictional amount, if not for lack of diversity. Cf. *Snyder* v. *Harris*, 394 U.S. 332, 89 S.Ct. 1053 (1969). If the federal court should allow aggregation of claims for usury against national banks, viewed by Mississippi as a "legal fraud" and non-maintainable under its usury laws, the result would be to allow the perpetration of legal frauds by local standards upon national banks but not upon state banks or local lenders, since these could not be reached by the Rule 23 procedural device. Cf. *Union National Bank* v. *Louisville N.A. & C. Ry. Co.*, 163 U.S. 325, 16 S.Ct. 1039 (1896); *Daggs* v. *Phoenix National Bank*, 177 U.S. 549, 20 S.Ct. 732 (1900). On the point that local law determines who may maintain an action for usury to the end that equal treatment may be had by all, see *Meadow Brook National Bank* v. *Recile*, 302 F.Supp. 62 (E.D. La. 1969); *Municipal Leasing Systems* v. *Northampton National Bank of Easton*, 382 F.Supp. 968 (E.D. Pa. 1974).

1005 (CA2, 1973); *Eisen* v. *Carlisle & Jacquelin*, 94 S.Ct. 2140, 417 U.S. 156 (1974), footnote 4.

Subpart (b)(3) conditions have not been met. The proof fails to show that questions of law or fact common to members of the class predominate over questions affecting only individual members; while there are some questions common to all, each individual case presents its own questions of fact and its own problems on issues of both liability and damages. By pragmatic standards, the case is unmanageable as a class action.

A class action is not superior to other available methods for the *fair* and *efficient* adjudication of the controversy, especially in view of (1) the availability of traditional procedures for prosecuting individual actions and the undesirability of concentrating the litigation of claims in this federal forum; (2) the substantive law and policy of the state which views the aggregation of usury claims as a "legal fraud" and unfair to the lender; (3) the invidious discrimination which would be imposed upon national banks in the enforcement of usury laws contrary to the intent of the National Banking Act; (4) the horrendous penalty sought to be imposed, which could result in destruction of the bank and benefit no one substantially other than the attorneys and (5) the tremendous burden which would be imposed upon the Court in attempting to handle 90,000 claims to the detriment of other deserving litigants who have at least equal claim upon the Court's time and energies.

The motion for an order that this case proceed as a class action is denied. The cause will proceed upon the individual complaints as in other cases.

We are of the opinion that this Opinion and the Order which will be entered pursuant hereto involve a controlling

question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal may materially advance the ultimate determination of the litigation. The order denying certification of this case as a class action is hereby certified for appeal pursuant to 28 U.S.C. §1292 and all proceedings in this Court are hereby stayed for a period of thirty (30) days pending possible appellate review of this Opinion and Order to be entered pursuant hereto.

This 27th day of September, 1975 at Biloxi, Mississippi.

/s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX B

FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT

[549-550]

Came on for approval the calculation of the amount for which judgment is to be entered as presented by plaintiffs and pursuant to the interlocutory order heretofore entered in this cause, and the Court finding that plaintiffs' calculation is correct and in conformity with the directions of said interlocutory order and that judgment should be entered accordingly in favor of each plaintiff pursuant to the offer of judgment as made by defendants;

IT IS ORDERED AND ADJUDGED AS FOLLOWS:

1. That the plaintiff, Robert L. Roper, do have and recover of and from defendants the principal sum of $683.30 plus legal interest in the sum of $206.12, making a total of $889.42 for which judgment is rendered.

2. That the plaintiff, Jack Hudgins, do have and recover of and from defendants the principal sum of $322.70 plus legal interest in the sum of $100.84, making a total of $423.54 for which judgment is rendered.

3. That the judgment in favor of each of the plaintiffs bear interest at the rate of 8% per annum from its date until paid and that each of the plaintiffs do have and recover their costs of Court to be taxed by the Clerk.

This judgment is entered pursuant to the offer of judgment as made by defendants for the amount demanded by the named plaintiffs in the original complaint, as

amended, and in the supplemental complaint as calculated by plaintiffs pursuant to the interlocutory order heretofore entered and is entered without waiver on the part of defendants of any defenses and without admission by the defendants of any liability to the named plaintiffs or others and is without advantage or prejudice to any of the parties or others upon any issue or question of liability to the named plaintiffs or others.

Plaintiffs have made a counter-offer of judgment which has been rejected by defendants. Plaintiffs do not accept defendants' offer of judgment, and this judgment on defendants' offer of judgment is entered over the objection of the plaintiffs.

The defendants may discharge their liability hereunder by depositing the sum awarded herein with the Clerk of the Court, pursuant to Rule 67 of the Federal Rules of Civil Procedure and may take the Clerk's receipt therefor, and the Clerk thereupon shall forthwith remit the amounts adjudged to the respective parties on their request.

SO ORDERED AND ADJUDGED on this the 15 day of July, 1976.

APPENDIX C

CLERK'S RECEIPT FOR DEPOSIT [551]

The undersigned Clerk in and for the jurisdiction aforesaid does hereby acknowledge receipt of the sum of $889.42 for payment of judgment of Robert L. Roper and the sum of $423.54 for payment of judgment of Jack Hudgins, pursuant to authorization as contained in the "FINAL JUDGMENT ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' OFFER OF JUDGMENT AS BY CONSENT" dated and entered on the 15th day of July, 1976.

DATED this 15th day of July, 1976.

APPENDIX D

NOTICE OF APPEAL

TAKE NOTICE that ROBERT L. ROPER and JACK HUDGINS, on behalf of all others similarly situated to themselves and on whose behalf the named Plaintiffs sought class action treatment, appeal the Judgment entered herein on July 15, 1976, and all prior orders.

APPENDIX E

IN THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

NO. 76-3600

ROBERT L. ROPER AND JACK HUDGINS, ON BEHALF OF ALL OTHER SIMILARLY SITUATED
Plaintiffs-Appellants

vs.

CONSURVE, INC., d/b/a BANKAMERICARD CENTER, AND DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, A BODY CORPORATE
Defendants-Appellees

MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION

Now come the appellees, (collectively called "Bank"), and respectfully move the Court for an order dismissing the Notice of Appeal and for cause, would show the following:

1. The case is moot as to the two individual plaintiffs because the plaintiffs have received a money judgment for all relief demanded.

2. The Notice of Appeal does not attempt to appeal from the final judgment in favor of the individual plaintiffs but seeks only an appeal "on behalf of all others similarly situated to themselves and on whose behalf the named plaintiffs sought class action treatment, . . .".

3. The "all other similarly situated" to plaintiffs on whose behalf the appeal is noticed are non-parties and have no standing to request review because there is no certification of this case as a "class action" under Rule 23 of the Federal Rules of Civil Procedure.

4. There is no justiciable "case or controversy" before the Court on which jurisdiction may be exercised prudentially or under Article III, § II, of the Constitution of the United States.

The following supporting papers are attached as an Addendum to this Motion: (reference to papers omitted)

Respectfully submitted,

/s/ Vardaman S. Dunn
Vardaman S. Dunn,
Attorney for Appellees

APPENDIX F

Robert L. ROPER et al.,
Plaintiffs-Appellants,

v.

CONSURVE, INC., d/b/a BankAmericard Center, and Deposit Guaranty National Bank, Jackson, Mississippi,
Defendants-Appellees.

No. 76-3600.

United States Court of Appeals,
Fifth Circuit.

Aug. 24, 1978.

Credit card holders brought class action against national bank on behalf of all other Mississippi holders of credit cards issued by bank, alleging that charges made were usurious under Mississippi law. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., denied certification following evidentiary hearing and, after bank tendered two class representatives payment in full of amount each individually claimed, entered judgment on behalf of plaintiffs, and plaintiffs appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) despite bank's offer to pay off named plaintiffs, named plaintiffs were not precluded from appealing denial of class certification; (2) class representation was adequate, and (3) class action was superior method of proceeding.

Reversed and remanded.

Thornberry, Circuit Judge, specially concurred and filed opinion.

1. Federal Civil Procedure (Key) 1698

Where there is determination that class is not maintainable, notice requirements of class action rule's dismissal or compromise provision do not apply, at least where dismissal and settlement of action do not directly adversely affect rights of individuals not before court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

2. Federal Civil Procedure (Key) 1696

By very act of filing class action, class representatives assume responsibilities to members of class, and they may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

3. Federal Courts (Key) 544

Defendant's satisfaction of representative plaintiffs' claims could not preclude them from appealing denial of class certification nor did it excuse them from their duty of doing so absent express approval by trial court. Fed.Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

4. Federal Courts (Key) 544

Member of putative class may appeal denial of certification, even though it has been decided that claims of named plaintiff lack merit. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

5. Federal Courts (Key) 544

An individual plaintiff who has already prevailed in trial court may appeal denial of class certification. Fed. Rules Civ.Proc. rule 23, 28 U.S.C.A.

6. Federal Courts (Key) 544

Individual plaintiff who loses on merits may appeal denial of class certification. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

7. Federal Civil Procedure (Key) 164

Even if named plaintiffs in class action had been satisfied with offer of judgment and had not objected, named plaintiffs continued to maintain stake in procuring class-wide relief. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Federal Civil Procedure (Key) 164

Where only major cost to be advanced before it could be determined whether defendant was liable was that of class notice, where postage for such notice, if individual mailing was required, would have been about $15,000, where counsel offered to advance that sum looking to named plaintiffs for repayment if required, where named plaintiffs offered note and mortgage on realty as security, and where named plaintiffs' counsel also offered to give bond to guarantee that notice costs would be met, named plaintiffs adequately established their ability to finance litigation for purposes of class certification. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

9. Federal Civil Procedure (Key) 164

Neither satisfaction nor denial of individual plaintiffs' claims, if effective, necessarily precluded their serving as adequate representative of class. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 182.5

Where credit card holders brought class action against national bank on behalf of 90,000 Mississippi residents who

held credit cards issued by bank alleging that charges made were usurious under Mississippi law, where claims were relatively small, averaging less than $100 each, where question of law involved applied alike to all, where individual fact determinations could be reached by using objective criteria and assistance of computer, and where potential class members could not effectively secure relief by another type of action, and where proposed class was peculiarly manageable plaintiffs were entitled to certification of class. Fed. Rules Civ.Proc. rule 23(b)(3), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 182.5

In class action brought by credit card holders against national bank on behalf of all other Mississippi holders of credit cards issued by bank in which plaintiffs alleged that charges made were usurious under Mississippi law, common questions predominated for purposes of saitsfying class action rule, and issues unique to each claim were not so complex as to make costs of determination prohibitive or to require individual evidentiary hearings. Fed. Rules Civ.Proc. rule 23(b), 28 U.S.C.A.

12. Federal Civil Procedure (Key) 161

Class action rule was designed to prevent problem of wasteful and uneconomical multiple individual actions, Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

13. Federal Civil Procedure (Key) 161

Because considering financial impact of judgment in determining whether to certify class, presupposes success on the merits and requires trial court to express an opinion on harshness vel non of particular remedy prior to trial itself, it ought to be allowed only in extreme cases. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

14. Federal Civil Procedure (Key) 182.5

Attitude of Mississippi law disfavoring usury suits did not preclude bringing of suit by credit card holders against national bank as class action since action was regulated by federal law and since state law, even if relevant, would yield to federal class action rule. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

15. Usury (Key) 82

Under Mississippi law usury claims are penal and are viewed as personal to borrower; aggregation of such claims is condemned.

16. Banks and Banking (Key) 270(1)

National Bank Act adopts usury laws of states only insofar as they severally fix rates of interest; sole particular in which national banks are placed on an equality with natural persons is as to rate of interest, and not as to character of contracts they are authorized to make. National Bank Act, 12 U.S.C.A. §§ 85, 86.

17. Banks and Banking (Key) 270(1)

Provisions of National Bank Act looking to local law as surrogate federal law for determining permissible interest charges were designed by Congress to place national banks on plane of competitive equality with other lenders in respective states. National Bank Act, 12 U.S.C.A. §§ 85, 86.

18. Federal Civil Procedure (Key) 182.5

Difficulties in management of class action suit brought by credit card holders against national bank did not preclude bringing of suit as class action, where all members of proposed class lived in one state, where defendant had

each member's address on computer, where itemized history of each account could readily be obtained, and where substantial costs would be involved only if bank was found to be liable on plaintiffs' usury claims. Fed.Rules Civ.Proc. rule 23(d)(3), 28 U.S.C.A.

19. Federal Civil Procedure (Key) 182.5

Possible assertion of counterclaims by national bank in class action brought against it by credit card holders did not preclude bringing of suit as class action. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Mississippi.

Before WISDOM, THORNBERRY, and RUBIN, Circuit Judges.

RUBIN, Circuit Judge:

This case presents two class action questions: whether the class action claim and, indeed, the entire controversy became moot when, after the trial court denied certification following an evidentiary hearing, the defendant bank tendered to the two class representatives payment in full of the amount each individually claimed and judgment was entered on their behalf; and, if not, whether a class action is superior to other available means for the fair and efficient adjudication of a claim for usurious charges on behalf of a class potentially comprising 90,000 holders of credit cards issued by a national bank. Having concluded that the defendants cannot moot the class claim by attempting to pay off the class representatives, we decide also that a class action is not only superior to other methods but singularly appropriate for the adjudication of this controversy, and, therefore, remand the case for further proceedings.

I.

Facts

Two holders of credit cards issued on the "BankAmericard" plan sued the national bank that had issued the cards under the National Bank Act, 12 U.S.C. §§ 85 and 86, contending that the charges made were usurious[1] on behalf of themselves and all other Mississippi holders of the same cards issued by the defendant.[2] Under the plan, card holders can buy merchandise or services from third persons who have contracts with the bank or other member banks, and charge their purchases. The merchants then sell the credit instruments to the bank at a discount. The bank bills the card holder; if the payment is not made within a certain time, it charges interest on the unpaid balance. During the suit period, there were 90,000 to 100,000 individual card holders.

The trial court declined to certify the action as a class action. The bank then made an offer of judgment to each of the two individual plaintiffs, without admitting liability, and tendered to each the maximum amount that each could have recovered ($889.42 and $423.54, respectively) by depositing this sum in the registry of the court. The two named plaintiffs have never accepted the tender, but judgment based on defendant's offer of judgment was entered over plaintiffs' objection.

The credit card system, as the experienced trial judge correctly stated, is made possible by the use of computers.

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1. The complaint alleges the rates exceeded those permitted by Section 36, Chapter 2 of the Mississippi Code (1942) as amended. *See* Title 75, ch. 17, §§ 1, 17, Mississippi Code (1974).

2. The original complaint also charged a violation of the Truth-in-Lending Statute, 15 U.S.C. § 1640, *et seq.*, but that claim has been dropped.

The computer charges each transaction to the card holder's account. If the credit instrument is placed by the merchant with some other bank, it is transmitted through normal banking channels to the defendant and appropriate funds or credits are transferred to the transmitting bank.

For the bank's convenience, the accounts are divided into ten separate groups, called cycles. The credit card accounts are posted on ten days a month; the charges for holders whose names are in each cycle are posted in one day. The computer is programmed so that, on the billing date, it adds charges, subtracts, credits, adds any finance charge due under the BankAmericard plan and prepares a statement reflecting each transaction. The statement is then mailed to the customer.

The data in the computer is stored on magnetic tapes. These are updated from period to period. Transaction data is not retained permanently on the tapes, however. It is printed (on "printouts"), and the printouts are retained. A microfilm record is made of all charge tickets, credit transactions and statements.

During the period in question, the bank made a monthly service charge of 1½% on the unpaid balance of each account. However, each customer was allowed 30 days within which to pay his account without any service charge; if payment was not received within that time, the computer added to the customer's next bill 1½% of the unpaid portion of the prior bill, which was shown as the new balance. This is the charge contended to be usurious. Thus, if a customer bought merchandise and the charge slip for this was received by the bank the day after a monthly bill had been mailed to him, he would not be billed for the new charge for almost 30 days, and would then have 30 more days within which

to make payment in full without incurring the service charge. On the other hand, an item might be received by the bank on the day before the new statement was prepared, yet the service charge for it would be computed on the same basis as if it were received at the beginning of the month. (When he received his bill, the customer might also elect to pay it in installments; in that case, the service charge was made only on unpaid installments.)

About 35% of the bank's customers did not incur a service charge. For the 65% who did the rate was always 1 1/2% on the unpaid balance; if the effective rate were computed based on the number of days from the date the bank received each charge until it was paid, that effective rate would vary for each customer each month. There was evidence that both the finance fees *charged* to each card holder and the fees each *actually paid* during the suit period can be tabulated, although this requires clerical assistance in addition to the use of the computer. The plaintiff's expert witness testified that the total cost of such preparation, including computation of the refund due each class member if the action were successful, would be $45,575.

It is also possible to reconstruct every account in full by again processing the transactions. The plaintiffs' expert estimated the cost of this, if it were required by the court, to be $125,000. He testified that there are contractors available to perform such services. The defendant's expert testified that, if it were necessary to reconstruct every individual account, the cost might range from $367,700 to $3,432,000.

The computer could, of course, easily be used to give notice to members of the class and sort out persons who are not class members (for example, because they opened accounts after the class was certified).

II.

Mootness

[1, 2] The notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. One well-publicized danger in the class action is the possibility that it will be used to collect quick, undeserved damages; this type of effort to establish a quick coup has been called a "strike suit." We have held that prior to certification a class action cannot be dismissed merely because the representatives are satisfied, unless there is notice to the putative class of the proposed dismissal and a determination by the court that the dismissal is proper, as required by Rule 23(e) F.R.C.P. *Pearson* v. *Ecological Science Corp.*, 5 Cir. 1975, 522 F.2d 171, 177, *cert. denied sub nom.*, 1976, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762, and cases cited therein. Where, as here, there is a Rule 23(c)(1) determination that the class is not maintainable, the notice requirements of Rule 23(e) do not apply if "dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that the dismissal does not prejudice putative members.

[3-6] Even if the court should have permitted the bank to pay off the named plaintiffs, either with their acquiescence or over their objection, this satisfaction of

their claims could not preclude them from appealing the denial of certification, nor would it excuse them from their duty of doing so absent express approval by the trial court. *See* generally, Miller, An Overview of Federal Class Actions: Past, Present and Future (Federal Judicial Center, 1977) at 57-63. A member of the putative class may appeal the denial of certification, even though it has been decided that the claims of the named plaintiffs lack merit. *United Airlines, Inc.* v. *McDonald*, 1977, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423. An individual plaintiff who has already prevailed in the trial court may appeal the denial of class certification. *Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701-702, and cases cited therein; *Esplin* v. *Hirschi*, 10 Cir. 1968, 402 F.2d 94, *cert. denied*, 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459. An individual plaintiff who loses on the merits may also appeal a denial of certification. *Horn* v. *Associated Wholesale Grocers, Inc.*, 10 Cir. 1977, 555 F.2d 270, 276-277; *Donaldson* v. *Pillsbury Co.*, 8 Cir. 1977, 554 F.2d 825, 831, note 5, *cert. denied*, 1977, 434 U.S. 856, 98 S.Ct. 177, 54 L.Ed.2d 128, and cases cited therein. There is no reason why an individual plaintiff to whom payment of his claim has been tendered should have less standing in the light of the judicial responsibility to ensure that class representatives adequately represent the interests of the class and do not settle either their claims or the class action without court approval.

In *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 10 (slip op. 6531, 6540, note 10), we noted that, if the representative's claim became moot prior to appellate review of a denial of certification based upon a full evidentiary hearing, there are several reasons for permitting the representative to appeal that decision.

In particular, unless the representative is permitted to appeal, whether the alleged error in denying certification will be reviewed will depend upon the intervention of a putative class member who, under *Pearson*, is not entitled to notice of the individual compromise and may be unaware that the putative class is without a representative who has a viable claim. Review of alleged judicial error ought not be foreclosed so fortuitously. Additionally, such intervenors offer inadequate protection because of the possibility that defendant will pay a satisfactory price for their abandoning the appeal.

[7] Constitutional requirements are met: a viable controversy still exists with respect to the maintainability determination. The only issue is who may raise it. Here, plaintiffs have a stake because of their objection to the compromise. However, even had they been satisfied with the offer of judgment, the result would not change; the individual plaintiffs would maintain a stake in procuring class-wide relief. *Gelman* v. *Westinghouse Electric Corp., supra.* Moreover, they maintain a nexus with the class and, for reasons detailed subsequently, continue to be adequate representatives for purposes of Rule 23(a)(4) despite the mootness of their claims. *See Satterwhite, supra,* ..... F.2d at ....., note 11 (slip op. at 6541, note 11); *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34, 42. Hence, the issue is properly before us on appeal.

III.

The Class Action

The lower court, after several conferences with counsel and a full study of the evidentiary materials, concluded that, although the numerosity, commonality and typicality

requirements of Rule 23(a)(1), (2) and (3) Fed.R.Civ.Proc. are met, the requirement of Rule 23(a)(4) that the plaintiffs fairly and adequately protect the interests of the class is not satisfied because of the inability of the named plaintiffs to finance the case. It found that the requirements of Rule 23(b)(3)[3] were not met because plaintiffs failed to establish that questions of law and fact common to class members predominate, and because a class action is not superior due to: (1) the availability of the traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims are aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counter-claims are filed. Upon review, we find that the requirements of Rule 23(a)(4) are met, and that the court went beyond the bounds allowed for the exercise of its discretion with respect to the Rule 23(b)(3) determination. *See Shumate & Co., Inc.* v. *National Association of Securities Dealers, Inc.*, 5 Cir. 1975, 509 F.2d 147, 155, *cert. denied*, 1975, 423 U.S. 868, 96 S.Ct. 131, 46 L.Ed.2d 97.

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3. The court found that the requirements of Rule 23(b)(1) were not met because the prospective class consisted entirely of small claimants who could not afford to litigate their individual actions; hence there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . ." and that Rule 23(b)(2) did not apply because the actions were not predominantly for injunctive or declaratory relief. *See Eisen* v. *Carlisle & Jacquelin*, 1974, 417 U.S. 156, 163, 94 S.Ct. 2140, 2146, note 4, 40 L.Ed.2d 732. It is not necessary for us to review these determinations because of the availabiilty of Rule 23(b)(3) certification. However, we note that the court's finding with respect to Rule 23(b)(1) [that individual actions are unlikely] is inconsistent with its determination that traditional procedures for prosecuting individual actions provide meaningful alternatives to class certification.

A. *Adequacy of Class Representation*

[8] No question is raised about the ability and willingness of the named plaintiffs fairly and adequately to protect the interests of the class, but the defendants do question the plaintiffs' ability to finance the litigation.[4] Their counsel are qualified and experienced. *Eisen* v. *Carlisle & Jacquelin* (*Eisen II*), 2 Cir. 1968, 391 F.2d 555, 562. The only major cost to be advanced before it is determined whether or not the defendant is liable is that of a class notice. *See Oppenheimer Fund, Inc.* v. *Sanders*, 1978, ... U.S. ....., 98 S.Ct. 2380, 57 L.Ed.2d 253. The postage for such a notice, if individual mailing is required, would be about $15,000. Counsel properly offered to advance that sum looking to the named plaintiffs for repayment if required. Their clients offered a note and mortgage on realty as security. Counsel has also offered to give a bond to guarantee that the notice costs will be met. The sufficiency of such action has been established, *Sayre* v. *Abraham Lincoln Federal Savings & Loan Ass'n*, E.D.Pa.1974, 65 F.R.D. 379, *modified*, D.C. 1975, 69 F.R.D. 117; *Halverson* v. *Convenient Food Mart, Inc.*, 7 Cir. 1972, 458 F.2d 927, 931 n. 7.

[9] Neither the satisfaction nor denial of the individual plaintiffs' claims, if effective, necessarily precludes

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4. According to Professor Arthur Miller, An Overview of Federal Class Actions: Past, Present and Future, (F.J.C.1977), at 32:

> There have been instances in which a district judge has concluded that the representatives are inadequate, at least in part, because they do not appear to have the financing to maintain the action. But this is a rather tricky consideration that must be treated with some care because if financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case is a factor, it probably should not be a determinative factor.

their serving as adequate representatives. We have permitted representatives to serve the class despite adjudications determining that their individual claims are not viable *if* they are members of the class and maintain an adequate nexus with it. *Long* v. *Sapp*, 5 Cir. 1974, 502 F.2d 34; *Huff* v. *N.D Cass Co. of Ala.*, 5 Cir. 1973, 485 F.2d 710, 712-714 (*en banc*). *See Gelman* v. *Westinghouse Electric Corp.*, 3 Cir. 1977, 556 F.2d 699, 701; *Satterwhite* v. *City of Greenville*, 5 Cir. 1978, ... F.2d ....., ..., note 8 (slip op. 6531, 6538, note 8), approving this jurisprudence and distinguishing *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 1977, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453, on the basis that the named representatives in that case were not members of the class at the time the suit was filed nor at the time of the certification decision. The relevant inquiry is whether the plaintiffs maintain a sufficient interest in, and nexus with, the class so as to ensure vigorous representation. The defendant's decision to confess judgment has not affected the vigor with which plaintiffs have pursued the class claims, and we find no basis for concluding that they have not satisfied the requirements of Rule 23(a)(4).

B. *Superiority of a Class Action*

[10] This is a classic case for a Rule 23(b)(3) class action. The claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation. The claims are relatively small, said even by the plaintiffs to average less than $100 each, and the question of law is one that applies alike to all. While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps

with some clerical assistance. It will not be necessary to hear evidence on each claim.

A number of similar class actions have been certified by district courts,[5] and appear to have been susceptible of management. Certification will achieve one of the primary purposes of the class action, "enhanc[ing] the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co. of California*, 1972, 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184. We consider separately each of the factors that are argued to militate against certification.

1. *Common Issues*

[11] The legal issues, as the trial court correctly noted, are whether the finance or service charge made is subject to the Mississippi statute on usury—for such a charge might be considered exempt from the statute; whether the charge is interest and, if so, what rate of interest is permissible; and whether the rate actually paid in any given case is to be determined on a daily, monthly, or other basis, and what dates are to be used for determination of the rate. If the legal issues are resolved in favor of some or all of the members of the class, there would then be factual questions; whether the permissible rate was exceeded in any given case, and, if so, by what amount.

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5. *Cosgrove* v. *First & Merchants National Bank*, E.D.Va. 1975, 68 F.R.D. 555; *Weit* v. *Continental Illinois National Bank & Trust Co.*, N.D.Ill.1973, 60 F.R.D. 5, *appeal dismissed*, 7 Cir. 1976, 535 F.2d 1010; *Cohen* v. *District of Columbia National Bank*, D.D.C.1972, 59 F.R.D. 84; *Partain* v. *First National Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56; *Zachary* v. *Chase Manhattan Bank*, S.D.N.Y.1971, 52 F.R.D. 532, together with a number of other cases reported by published decisions. *See* dicta in *Fisher* v. *First National Bank of Omaha*, 8 Cir. 1977, 548 F.2d 255, 262.

In determining these issues, it may (or may not, dependent upon Mississippi law), be important that the effective daily rate or monthly rate paid would vary from one account to another. If Mississippi law proscribes or permits a 1½% charge *per se*, the effective daily rate will be unimportant. If Mississippi law determines whether a charge is usurious depending not on its nominal terms but on the average daily rate charged, then whether the effective rate is based upon the period commencing when the bank receives the bill or when the customer receives the bill may determine whether the rate is usurious. Additionally, if the period ends on the date the charge is actually paid, as opposed to the date the charge is due, the effective rate charged a customer who paid his account five days after receiving a billing showing a finance charge (35 days after the charge was computed at the rate of 1½% a month) would be different from the rate paid by another customer who paid 29 days after receiving the bill (59 days after the charge was compiled).

Thus, it may (or again, may not, dependent on whether *any* charge made was usurious under Mississippi law, or whether every 1½% charge made was excessive, or whether some other standard applies) be necessary to reconstruct each card holder's account. Neither the trial court nor we can know in advance of a substantive decision whether it is necessary to make a computation (after all, the charge may be valid); or, if it is, how Mississippi law determines what is usurious and by what standards the computations are to be made. The best scenario for the utility of a class action is constructed if the trial court decides that the charge can never be considered usurious; the defendant disposes of 90,000 potential claims in one coup. The worst hypothesis will materialize if the court decides that Mississippi law requires the rate to be computed on each individual account on a daily-rate basis.

Whether the testimony of plaintiffs' expert (who has done a similar job before) or defendant's expert (who obviously fears disaster) be accepted, no computation need be made, and no costs need be incurred until the trial court determines the applicable Mississippi rule and, if Mississippi law appears to create liability, sets standards for its application, perhaps by an inexpensive preliminary sample of accounts.

Hence, common questions predominate for purposes of satisfying Rule 23(b)(3); the issues unique to each claim, if any are raised, are not so complex as to make the costs of determination prohibitive, or to require individual evidentiary hearings.

2. *Availability of Other Relief*

The potential class members cannot effectively secure relief, if any is due, by another type of action. The suggestion by the defendant that each plaintiff might resort to a Mississippi small claims court assumes that the procedures of such courts are adequate for the sophisticated type of claim here presented, and that Mississippi state courts could handle this volume of suits. Moreover, the national bank defendant could remove every such case to federal court. 28 U.S.C. §§ 1337 and 1441(b); *see Partain* v. *First Nat'l. Bank,* 5 Cir. 1972, 467 F.2d 167. *Cf. Marquette Nat'l. Bank* v. *First Nat'l. Bank,* D.Minn.1976, 422 F.Supp. 1346.

What is more important is that each plaintiff has the right to seek relief in federal court. If even one-twentieth of them chose to do so, the court would have 5000 suits to dispose of, approximately four times the total number of suits of all kinds filed with its clerk annually.[6] Should

6. Management Statistics for United States Courts 1977, at 60. One thousand two hundred eighty nine (1,289) cases were filed in the Southern District of Mississippi in the twelve month period ending June 30, 1977.

a federal forum be used for such individual actions, the cost of each action would surely increase, as would the cost of determining damages. The alleged statutory wrong may go unchallenged because the costs of proof exceed the likely recovery. *See* Wright & Miller, Federal Practice and Procedure, § 1779 at 61 (1972 ed.).

[12] Even assuming *arguendo* that multiple individual actions were feasible, they would be wasteful and uneconomical. This is precisely the problem that Rule 23 was designed to prevent. "The very purpose to be served by a class action is the opportunity it affords to prevent a multiplicity of suits based on a wrong common to all." *Green* v. *Wolf Corp.,* 2 Cir. 1968, 406 F.2d 291, *cert. denied,* 1969, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766.

3. *Impact on Defendant*

In Truth-in-Lending actions, Congress has manifested its concern about suits potentially ruinous to defendants by limiting recovery. 15 U.S.C. § 1691e. There appears to be no comparable limit for class actions under the National Banking Act although recovery is limited in actions of this type to twice the amount of the interest paid. 12 U.S.C. § 86. *See McCollum* v. *Hamilton Nat'l. Bank,* 1938, 303 U.S. 245, 247, 58 S.Ct. 568, 570, 82 L.Ed. 819; *Coral Gables First Nat'l. Bank* v. *Constructors of Fla., Inc.,* Fla. App. 1960, 119 So.2d 741; *First Nat'l. Bank* v. *Lowery,* 1937, 234 Ala. 56, 173 So. 382; *First Nat'l. Bank* v. *Davis,* 1911, 135 Ga. 687, 70 S.E. 246. We find no evidence that Congress otherwise sought to protect the net worth of national banks against damaging suits if, in fact, they overcharged their customers. If it be assumed, however, that courts should heed hurricane warnings about potential disasters to defendants and use them as a reason to evacuate class actions then, we consider this to be less than catastrophic.

If it is assumed that the defendant is correct when it states that about 35% of the card holders paid no service charge, then the number of potential claimants is 60,000. If the average recovery is $100 each, the potential liability is large ($12,000,000) but not ruinous to a defendant with capital accounts of $45,000,000 and with assets of $520,-000,000.

[13] Unlike the situation under some statutes, we are not concerned with a fixed minimum penalty of a substantial amount for a technical violation, *see Partain* v. *First Nat'l. Bank of Montgomery*, M.D.Ala.1973, 59 F.R.D. 56, 60-61, that if magnified, would exact a punishment unrelated to statutory purposes. *Compare Ratner* v. *Chemical Bank N. Y. Trust Co.*, S.D.N.Y.1972, 54 F.R.D. 412. Because considering the financial impact of a judgment presupposes success on the merits and requires the trial court to express an opinion on the harshness *vel non* of a particular remedy prior to trial itself, it ought to be allowed only in extreme cases.

4. *Mississippi Usury Law and Aggregation*

[14-17] Nor is the attitude of Mississippi law disfavoring usury suits sufficient to deter the entertainment of this class action. Usury claims are penal in Mississippi and are viewed as personal to the borrower; the aggregation of such claims is condemned.[7] *Fry* v. *Layton*, 1941, 191 Miss. 17, 2 So.2d 561.[8] Of course, we deal here with a

7. Class action treatment in the present case is not the same as aggregation of claims. Recovery for each individual member of the class is sought, and for no more than the amount of the illegal interest extracted from each class member and the equal penalty payable to each class member.

8. In *Fry* v. *Layton, supra*, the Mississippi statute required a forfeiture of both interest *and principal*. The appellee had sought to buy up claims from borrowers of a loan company and thereafter aggregate such claims and recover of the lender both interest *and principal*. This type of scheme was denominated "legal fraud" by the Mississippi court. 2 So.2d at 565.

claim against a national bank, controlled in matters of procedure by the Federal Rules of Civil Procedure. *John R. Alley & Co.* v. *Federal Nat'l. Bank of Shawnee*, 10 Cir. 1942, 124 F.2d 995; the action is regulated by federal law, although the federal statute may look to local law as surrogate federal law for determining the permissible interest charges. 12 U.S.C. § 85.[9] As we said in *Partain* v. *First National Bank of Montogmery*, 5 Cir. 1972, 467 F.2d 167, 173:

> This interplay between the federal statute and State usury laws is elucidated by *Evans* v. *National Bank*, 251 U.S. 108, 40 S.Ct. 58, 64 L.Ed. 171 (1919): "The National Bank Act establishes a system of general regulations. It adopts usury laws of the states *only* insofar as they severally fix the rate of interest"; by *National Bank* v. *Johnson*, 104 U.S. 271, 26 L.Ed. 742 (1881): "The sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest, and not as to the character of contracts they are authorized to make . . . ."

(Emphasis added & original)

Hence, the state law with respect to aggregating usury claims that derive from state law is inapposite with respect to claims founded on federal statute, and would yield to Rule 23, F.R.C.P., even if relevant.

9. These provisions of the Act were designed by Congress to place national banks on a plane of competitive equality with other lenders in respective states by adopting state law with respect to permissible interest rates. *Fisher* v. *First National Bank*, 8 Cir. 1977, 548 F.2d 255; *First National Bank in Mena* v. *Nowlin*, 8 Cir. 1975, 509 F.2d 872; *Brown* v. *First Nat'l City Bank*, 2 Cir. 1974, 503 F.2d 114; *Monongahela Appliance Co.* v. *Community Bank & Trust, N.A.*, N.D.W.Va., 1975, 393 F.Supp. 1226, *aff'd*, 4 Cir. 1976, 532 F.2d 751.

5. *Manageability*

[18] The case presents no unusual difficulties in class management. While the class is large, it is peculiarly manageable. All the members live in one state, the defendant has each member's address on a computer; both that address and the itemized history of each account can readily be obtained.

After substantive rulings are made on the basic issues of liability and damage computation, the case is so manageable that a computer, either in the bank itself or leased elsewhere, can handle its *administration*—as distinguished from the ultimate computation which may in some instances require clerical personnel. The task is not a particularly difficult one when compared to the work that the bank ordinarily performs on its own computer. Under any theory the work involved in the refund computation procedure will represent only a small fraction of the work originally done on the credit card accounts by the bank's computer operation. The evidence shows that this ordinary work was done with such comparative ease that the computer could also do all of the other work of the bank, plus the work of 60 or 70 other banks under contract with it and continue to advertise for more business.

We do not agree with the trial court that there is a serious possibility that the defendant, "faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement or even a compromise on procedure to minimize the enormous cost and disruption of its normal business functions." We do not minimize the effect of "strike actions," and we certainly do not applaud them. But, as we have indicated, the specter of large cost will materialize only if, after a preliminary hearing, it appears likely that damages are actually due a large number of class members. Only then,

after liability is determined, will there be substantial cost, either in defense or in payment of damages.

[19] The lower court alluded to the potential problem of counter-claims. This likewise can be handled, if that point is reached, by adopting standards and classifying the claims. *See Weit* v. *Continental Illinois Nat'l. Bank,* N.D. Ill. 1973, 60 F.R.D. 5. If the court should conclude at any time that the entire group of counter-claims makes the plaintiffs' claims on behalf of such persons unmanageable, the court has the continuing authority under Rule 23 to issue a supplemental order excluding counter-claim defendants from the plaintiff class or separating and severing the class into two different classes, one with counter-claims and one without counter-claims. As Judge Johnson said in *Partain, supra*:

> The potential assertion of counter claims against these few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled. At the same time the rights of the defendant should be protected.

59 F.R.D. at 59.

Of course, the easiest way for any court to handle complex class litigation is simply to deny certification; this may have the real effect of permitting a defendant to violate a federal statute either with impunity or minor expense. In the present case few of the individual claimants would have the resources necessary to litigate against a well-financed defendant. This consideration underlies the decision of the Seventh Circuit in *Hohmann* v. *Packard Instrument Co.*, 7 Cir. 1968, 399 F.2d 711, which found a similar situation a classic one for sustaining the class action

involved. Quoting its prior decision in *Weeks* v. *Bareco Oil Company*, 7 Cir. 1941, 125 F.2d 84, 90, the court said:

> To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.

399 F.2d at 715.

For these reasons, we REVERSE and REMAND to the trial court for further proceedings consistent with this opinion.

THORNBERRY, Circuit Judge, specially concurring:

I write separately to express my views on the mootness issue discussed in Part II of Judge Rubin's thorough and scholarly opinion, which I fully join in all other respects. Although I agree that a defendant should not be able to terminate a class action by tendering a few dollars to a putative class representative, I cannot subscribe to the sweeping dicta in the majority opinion that treats fact situaions foreign to the instant case. Here the named plaintiffs strenuously objected to the defendant's "settlement" offer, and it cannot be said that a true settlement took place. The voluntary acceptance by named plaintiffs of such an offer is not involved, however, and I see no need to address the mootness question that it would present.

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Tel 504—598-6514
600 Camp Street
New Orleans, La. 70130

October 20, 1978

TO ALL PARTIES LISTED BELOW:

No. 76-3600—Robert L. Roper, et al. vs. Consurve, Inc. etc. and Deposit Guaranty National Bank, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk
By /s/ Clare F. Sachs
Deputy Clerk

cc Mr. William Roberts Wilson, Jr.
Mr. Toxey Hall Smith, Jr.
Mr. Frederick G. Helmsing
Mr. Champ Lyons
Mr. Vardaman S. Dunn

APPENDIX H

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-3600

D. C. Docket No. CA-4261-(N)
ROBERT L. ROPER, ET AL.,
Plaintiffs-Appellants,

versus

CONSURVE, INC., d/b/a BankAmericard Center, and DEPOSIT GUARANTY NATIONAL BANK, Jackson, Mississippi,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX I

UNITED STATES CONSTITUTION

Article III.—The Judiciary

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

APPENDIX J

12 U.S.C., §85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank

is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

As amended Oct. 29, 1974, Pub.L. 93-501, Title II, § 201, 88 Stat. 1558.

APPENDIX K

12 U.S.C., §86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198.

APPENDIX L

MISSISSIPPI CODE OF 1972

CHAPTER 17

Interest

New Sections Added

SEC.

§ 75-17-1. Legal rates of interest and finance charges.

(1) The legal rate of interest on all notes, accounts and contracts shall be six percent (6%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

(2) Any borrower may contract for and agree to pay a finance charge for any loan or other extension of credit made directly or indirectly to a borrower, which will result in a yield not to exceed ten percent (10%) per annum, calculated according to the actuarial method, which shall be known as the contract rate.

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any domestic or foreign corporation organized for profit may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any nonprofit corporation organized to own, operate or finance any educational facility or function may agree to pay any rate of finance charge in excess of the maximum rate provided in this section, but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two thousand five hundred dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed two thousand five hundred dollars ($2,500.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such corporation, its successors, guarantors, assigns, or anyone on its behalf is prohibited.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership may agree to pay any rate of finance charge in excess of the maximum rate provided in this section but not to exceed fifteen percent (15%) per annum, calculated according to the actuarial method, on any contract or other obligation under which the principal balance to be repaid shall originally exceed two hundred fifty thousand dollars ($250,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally contracted in writing to be advanced shall exceed two hundred fifty thousand dollars ($250,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury by such partnership or its guarantors, assigns, or anyone on its behalf is prohibited. This paragraph shall not apply to any contract or other obligation relating to the purchase of agricultural lands or secured by security instrument on agricultural lands or the financing of the production of agricultural products or livestock, agricultural processing or other manufacturing businesses.

(6) Notwithstanding the foregoing and any other provision of law to the contrary, any retail seller, and any lender or issuer of credit cards may lawfully contract for and receive a finance charge for credit sales of goods, services or merchandise certificates or for cash advanced or other credit extended pursuant to a revolving charge agreement by applying a periodic rate no greater than one and one-half percent (1 1/2%) per month to:

(a) the average daily balance of the account, exclusive of finance charge, in each billing period;

(b) an amount that shall not exceed the balance of the account, exclusive of finance charge, on the first day

of each billing period without adding purchases or miscellaneous debits to the account during the billing period; or

(c) any balance of the account during each billing period which does not produce an amount of finance charge in excess of that permitted by (a) or (b).

Notwithstanding the foregoing, the maximum finance charge which may be charged or collected on any balance in excess of eight hundred dollars ($800.00) shall be determined by applying a periodic rate no greater than one and one-quarter percent (1¼%) per month to that portion of the applicable balance which is in excess of eight hundred dollars ($800.00) but not greater than twelve hundred dollars ($1200.00) and by applying a periodic rate not greater than one percent (1%) of the principal balance which exceeds twelve hundred dollars ($1200.00).

No finance charge may be charged or collected for purchases of goods or services or merchandise certificates until one (1) month after the billing statement date on the billing statement where such purchases of goods or services initially appear. The billing statement shall not state that Mississippi law requires the imposition of a finance charge. The term "month" as used in this paragraph (6) means either (1) a calendar month, or (2) a minimum of thirty (30) consecutive calendar days, or (3) the number of days elapsing between the same numerical calendar day of successive calendar month. "Revolving charge agreement" means an agreement by the terms of which retail sellers may sell goods, services, merchandise certificates, or by which a lender or issuer finances the purchase of goods or services or by which a lender makes cash advances, by the use of credit cards or otherwise, pursuant to which the amount financed is payable either

within a stated period or in installments over a period of time, and the terms of which may provide for finance charges to be assessed on the unpaid balance as it exists from time to time; the term "revolving charge agreement" does not include the lending of money evidenced by a promissory note.

(7) Notwithstanding the foregoing and any other provision of law to the contrary, the maximum finance charge which may be contracted for and received for any loan or extension of credit made by a licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Thirty-six percent (36%) per annum for the portion of the unpaid balance of the amount financed that is not greater than six hundred dollars ($600.00);

(b) Thirty-three percent (33%) per annum for the portion of the unpaid balance of the amount financed in excess of six hundred dollars ($600.00) but not greater than eighteen hundred dollars ($1800.00);

(c) Twenty-four percent (24%) per annum for the portion of the unpaid balance of the amount financed in excess of eighteen hundred dollars ($1800.00) but not greater than forty-five hundred dollars ($4500.00);

(d) Twelve percent (12%) per annum for the portion of the unpaid balance of the amount financed in excess of forty-five hundred dollars ($4500.00).

Nothing in this paragraph (7) shall prohibit lending money or handling, negotiating or arranging loans for a finance charge that is less than that specified herein. This

paragraph (7) does not limit or restrict the manner of contracting for the finance charge whether by way of add-on, discount, or otherwise, so long as the annual percentage rate of the finance charges does not exceed that permitted by this section.

(8) Notwithstanding the foregoing or any other provision of law to the contrary, the maximum finance charge which may be contracted for or received for any loan or extension of credit made by any lender or by any retail seller in connection with sales of manufactured moveable homes, commonly known as mobile homes, may result in a yield not to exceed the following annual percentage rates calculated according to the actuarial method:

(a) Twenty-five percent (25%) per annum on that part of the unpaid balance of the amount financed which does not exceed one thousand dollars ($1,000.00);

(b) Eighteen percent (18%) per annum on the part of the unpaid balance of the amount financed which is more than one thousand dollars ($1,000.00) but does not exceed two thousand five hundred dollars ($2,500.00);

(c) Twelve percent (12%) per annum on that part of the unpaid balance of the amount financed which is more than two thousand five hundred dollars ($2,500.00).

(9) The term "finance charge" as used in this section and in sections 75-17-13, through 75-17-17, 63-17-13, 75-67-127 and 75-67-217 means the amount or rate paid or payable, directly or indirectly, by a debtor for receiving a loan or incident to or as a condition of the extension of credit, including but not limited to interest, brokerage fees, finance charges, loan fees, discount, points, service charges, transaction charges, activity charges, carrying charges, finders fees or any other cost or expense to the debtor for services rendered or to be rendered to the debtor in making, ar-

ranging or negotiating a loan of money or an extension of credit and for the accounting, guaranteeing, endorsing, collecting and other actual services rendered by the lender; provided, however, that recording fees, motor vehicle title fees, attorney's fees, insurance premiums, fees permitted to be charged under the provisions of section 79-7-7, Mississippi Code of 1972, and with respect to a debt secured by an interest in land, bona fide closing costs and appraisal fees incidental to the transaction shall not be included in the finance charge. Subject to the other provisions of this section and sections 75-17-13 through 75-17-17, 63-17-13, 75-67-127 and 75-67-217, the finance charge may be calculated on the assumption that the indebtedness will be discharged as it becomes due, and prepayment penalties and statutory default charges shall not be included in the finance charges. None of the previous paragraphs shall limit or restrict the manner of contracting for such finance charge, whether by way of add-on, discount, or otherwise, so long as the annual percentage rate does not exceed that permitted by law. If a greater finance charge than that authorized by this section or by other applicable law shall be stipulated for or received in any case, all interest and finance charge shall be forfeited, and may be recovered back, whether the contract be executed or executory. If a finance charge be contracted for or received that exceeds the maximum authorized by law by more than one hundred percent (100%), the principal and all finance charges shall be forfeited and any amount paid may be recovered by suit. The provisions of this section shall not restrict the extension of credit pursuant to any other applicable law. A licensee under the Small Loan Regulatory Law (Sections 75-67-101 through 75-67-135, Mississippi Code of 1972), and the Small Loan Privilege Tax Law (Sections 75-67-201 through 75-67-243, Mississippi Code of 1972), may contract for and receive finance charges as authorized by

paragraph (7) hereof regardless of the purpose for which the loan or other extension of credit is made.

(10) No lender or other person shall use multiple notes, accounts, contracts or agreements with intent to obtain a higher finance charge than permitted by law. If a finance charge be stipulated for or received in any case in violation of this paragraph, all interest and finance charge shall be forfeited.

(11) No lender or other person shall charge a sum or prepayment penalty for the prepayment of any note or evidence of a debt secured in whole or in part by lien on real estate greater than the following:

(a) Five percent (5%) of the unpaid principal balance if prepaid during the first year;

(b) Four percent (4%) of the unpaid principal balance if prepaid during the second year;

(c) Three percent (3%) of the unpaid principal balance if prepaid during the third year;

(d) Two percent (2%) of the unpaid principal balance if prepaid during the fourth year;

(e) One percent (1%) of the unpaid principal balance if prepaid during the fifth year;

(f) No penalty if prepaid more than five (5) years from date of the note creating the debt.

Provided, that this paragraph shall apply only to loans, the security for which is a lien on real estate comprising a single family dwelling or a single family condominium unit, or on real estate used primarily for agricultural or livestock purposes; further provided that this paragraph shall not apply where a greater penalty is required by any law or regulation of the United States of America, or agency thereof.

SOURCES: Laws, 1972, ch. 436, § 1; 1973, ch. 387, § 1; 1974, ch. 564, § 1, eff from and after July 1, 1974, eff from and after passage (approved March 27, 1973).

§ 75-17-17. Law governing loans made or credit extended prior to July 1, 1974.

Loans made and credit extended prior to July 1, 1974 shall continue to be governed by the provisions of laws governing such loans and extensions of credit which were in force at the time such loans or extensions of credit were made, including laws repealed hereby except that finance charges contracted for or received prior to July 1, 1974 shall not be unlawful if the finance charge contracted for or received conforms with the provisions of this act or other law then in effect. Any loan or note renewed, refinanced, deferred or otherwise extended or altered on or after July 1, 1974 shall conform with the provisions of sections 63-17-13, 75-17-1, 75-17-13 through 75-17-17, 75-67-127 and 75-67-217.

SOURCES: Laws, 1974, ch. 564 § 7, eff from and after July 1, 1974.